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Docket No.

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
ex rel. WILLIAM DEVLIN,
ROD KODMAN,

Petitioners - Appellants,

v.

STATE OF CALIFORNIA;
COUNTY OF MARIPOSA;
and TOM ARCHER,

Respondents - Appellees.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a non-opportunistic *qui tam* relator must qualify as an "original source" under subsection "B" of 31 U.S.C. §3730 (e)(4) to overcome the jurisdictional bar of that statute without a prior determination that the relator's action is barred because it is "based upon" publicly disclosed "allegations or transactions" as found in subsection "A" of that statute where the relator is the first person to disclose the allegations, transactions, and facts underlying his eventual suit to both the government and the media prior to filing suit and where the relator did not derive any allegation or information of fraud, in any part, from any publicly disclosed allegation, transaction or information.

II. Whether in the confidential arena of federal welfare funding claims by state and county governments, a non-opportunistic *qui tam* relator who learns of systematic county and state government welfare funding fraud through both verbal information and through examining documents from the same county social worker who willfully perpetrated the fraud on the Federal treasury has "direct" knowledge of the information on which his allegations are based so as to be an "original source" under the *qui tam* provisions of 31 U.S.C. §3730 (e)(4)(B) thus entitling the relator to relief from the jurisdictional bar of the statute where the relator also has "independent" knowledge of the information on which the allegations are based and where upon discovery, the relator is the first to report the past and continuing fraud to the government while not deriving any allegation of fraud, in any part, from any publicly disclosed allegation, transaction, or information prior to filing suit.

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PETITION FOR WRIT OF CERTIORARI

Private citizen relators William Devlin, and Rod Kodman, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 84 F.3d 358 (9th Cir. 1996), and is reprinted at Appendix A. It affirmed the decisions of the United States District Court, Eastern District of California, No. CV-F-92-5086-REC, and are reprinted at Appendix B.

JURISDICTION

The Court of Appeals entered judgment on May 24, 1996. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction in the District Court was asserted under Title 31 U.S.C. § 3729, *et seq.*

STATUTE INVOLVED

The False Claims Act, 31 U.S.C. § 3730(e)(4) provides in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit or investigation, of from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

This is an action brought under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (hereinafter "FCA"), which permits private individuals, as *qui tam* plaintiffs or relators, to bring a civil action for the individuals and for the United States to recover funds from a "person" who has presented fraudulent or false claims for payment to the Government.

Petitioners William Devlin (hereinafter "Devlin") and Rod Kodman (hereinafter "Kodman") are private citizens of the United States. Stanley S. Sidicane, the remaining relator named in this action is now deceased.

On December 13, 1991, William Cotey (hereinafter "Cotey") a Mariposa County social worker telephoned Kodman and informed Kodman that Cotey had systematically falsified past and then current social services statistics for the sole purpose of increasing Mariposa County's federal funding. Cotey alleged that his direct supervisor, Tom Archer, encouraged him to do so. Kodman and Devlin met Cotey for the first time and in person on that same day at which time Cotey reiterated that he had inflated case report statistics and created false case files.

On December 18, 1991 and December 23, 1991, Kodman contacted his Congressman, Gary Condit's office, informing Condit's staff of the alleged fraud.

On January 6, 1992, Kodman telephoned the Fresno office of the Federal Bureau of Investigation and discussed the alleged fraud with Special Agent Jim Hyndman.

During the week of January 13, 1992, Devlin again met with Cotey to discuss the alleged fraud.

On January 21, 1992, Kodman received a letter from Cotey stating that Cotey had been directed to falsify Child Protective Service records to increase federal funding and that he had, in fact, done so.

January 21, 1992, Kodman caused copies of allegedly falsified documents and Cotey's January 21, 1992 letter to be forwarded to Congressman Condit's office. Kodman also sent a copy of the documentation and letter to California Assemblyman Sal Cannella.

On January 22, 1992, Kodman delivered a copy of the same Cotey letter and documentation to the to Federal Bureau

of Investigation and, also, to California Assemblyman Jim Costa.

January 23, 1992, Kodman sent the same letter and documentation from Cotey to Governor Pete Wilson of California. That same day, Kodman also wrote to Congressman Condit requesting that Cotey's letter and the other documentation of fraud be delivered to 1) Congressman Bob Wise, Chairman of the House Government Operations Subcommittee, 2) the United States Inspector General and 3) the U.S. Accounting Office to initiate an investigation.

On January 27, 1992, Kodman wrote directly to Representative Bob Wise sending the same Cotey letter and documentation to instigate an investigation.

On January 28, 1992, Kodman wrote to the California Auditor General, Kurt Sjboerg, requesting an investigation of the alleged fraud.

On January 31, 1992, Kodman received a letter from the California Auditor General's office stating "[b]ecause the improper activities you describe are taking place at the local level, we do not have jurisdiction to conduct an investigation under the Improper Activities Act. Therefore, we cannot conduct an audit upon your request."

On February 3, 1992, Kodman wrote to Congressman John Doolittle regarding the alleged fraud, requesting him to deliver copies to Congressmen Bob Wise and John Dingle, as well as the U.S. Inspector General, the General Accounting Office and the U.S. Department of Health and Human Services.

On February 3, 1992, Kodman also wrote to Congressman John Dingle, Chairman of the House Subcommittee on Oversight and Investigation regarding the alleged fraud sending Cotey's letter and the supporting documentation again to also be forwarded to the General Accounting Office and the Department of Health and Human Services.

On or about January 31, 1992, Devlin and Kodman provided some information about the alleged fraud to a reporter for the *Mariposa Gazette*. Devlin subsequently also met with Cotey and the same reporter to discuss more details of their allegations.

On February 5, 1992, Kodman received a letter from Michael Lynch, Chief-of-Staff to Congressman Gary Condit stating that the "...federal government's role...was to provide a funding source that passes funds to the states which then passes them to the various counties. The federal government is not the regulatory agency in this area." The letter also indicated that no more action by the Congressman was appropriate at that time and that none of Kodman's documentation would be passed along to anyone.

On February 6, 1992, the *Mariposa Gazette* then published an article mentioning alleged creative record-keeping by Mariposa County social services regarding inflated federal funding statistics.

On February 11, 1992, Devlin and Kodman filed an action in *pro per* under the *qui tam* provisions of the FCA. Their complaint alleged that beginning in 1990, the Social Services Department of Mariposa County, California, at the direction of Tom Archer began to systematically and fraudulently increase Mariposa County's federal funding for Child Protective Services by instructing social workers to inflate statistics and create false case files thereby creating fraudulent claims. The suit also alleged that the State of California and its officials failed to take any action to investigate, reclaim or repay the monies fraudulently and unlawfully received, acting in deliberate ignorance of the truth or falsity of the information given to them and acting in reckless disregard of the truth or falsity of the information provided by Kodman and Devlin.

The Government filed a Notice of Declination of Appearance.

Mariposa County and Archer moved to dismiss this action on the ground that the District Court did not have subject matter jurisdiction pursuant to section 31 U.S.C. §3730(e)(4)(A) and (B). The State of California joined in the motion to dismiss.

On July 19, 1993, the United States District Court for the Eastern District of California granted the motion to dismiss, holding that the statute divested the court of jurisdiction because "none of the relators have shown that they are [sic] original source of the information within the meaning of Wang." (App. B, 47)

The District Court on July 26, 1993, corrected its Order Dismissing Action for Lack of Subject Matter Jurisdiction filed on July 19, 1993, *nuc pro tunc*, to correct the sentence at lines 25-26 on page 3 and lines 1-2 on page 4. The District Court also corrected the sentence on lines 2-4 at page 5. (App. B, 47)

The relators filed a Motion for Reconsideration of the District Court's order dismissing the action for lack of subject matter jurisdiction. The relators argued that the intent of §3730 (e)(4)(A) of the FCA is to bar persons from filing suit "based upon" information they obtained from a public source such as a newspaper and that the FCA was never intended to bar the action of persons who had knowledge of the fraud prior to public disclosure.

For strategic reasons, the relators did not fully disclose the extent of the documentary evidence in their possession. Consequently, the relators attached as exhibits to their Motion for Reconsideration, a letter from Cotey to Kodman, copies of ledger cards and time sheets used by Cotey to show fraudulent work for which the United States was billed. Kodman also included his declaration stating that these documents were in the relators' possession long before the publication of the newspaper article in the *Mariposa Gazette*. These documents set out specific instances of fraud not contained in the newspaper article showing specific files that were falsified by Cotey.

On September 2, 1993, the District Court denied the relators' Motion for Reconsideration concluding that "[t]his newly provided information is no different than that provided to the court by the relators in connection with the Motion to Dismiss. Therefore, this information in no way causes the court to reconsider its ruling." (App. B, 49)

The Ninth Circuit affirmed the judgment of the District Court's dismissal of the relators' complaint for lack of subject matter jurisdiction on May 24, 1996. (App. A, 28)

ARGUMENT FOR GRANTING THIS PETITION

I. THIS COURT SHOULD RESOLVE THE DIRECT CONFLICT AMONG THE CIRCUITS REGARDING WHETHER THE JURISDICTIONAL BAR OF 31 U.S.C. §3730 (e)(4) REQUIRES A TWO-STEP OR THREE-STEP ANALYTICAL APPROACH CENTERING ON THE MEANING OF "BASED UPON."

A. Different Analytical Approaches To Construing The Statute Are Used Among The Circuits.

Legislators who drafted, sponsored, and approved the 1986 amendments to the FCA intended to encourage and increase the number of potential *qui tam* plaintiffs who will step forward to disclose instances of fraud on the federal treasury. As was recorded at the time of the 1986 amendment,

> [t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits. S.Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), U.S.Code Cong. & Admin.News 1986, pp. 5266, 5288-5289.

In an effort to ostensibly effectuate this legislative intent, United States Circuit Courts have created many analytical approaches to when a *qui tam* plaintiff must qualify as an "original source" under subsection "B" of the FCA any time the allegations contained in the plaintiff's complaint are publicly disclosed prior to filing suit.

In the 1994 case of *United States ex rel. Siller v. Becton Dickinson and Co.*, 21 F.3d 1339 (4th Cir. 1994) *cert. denied*, 115 S. Ct. 316, the court at page 1348 noted that the Circuit Courts are at odds as to when and how a prior public disclosure of the allegations contained in a *qui tam* plaintiff's subsequent complaint require "original source" analysis. In some Circuits, the court must determine whether a plaintiff qualifies as an "original source" because such prior publication would presumptively otherwise bar the action. In other Circuits, a plaintiff may proceed if the allegations of the plaintiff's complaint are not "derived from" publicly disclosed allegations such as when a qui tam plaintiff is ignorant of such disclosure or when the plaintiff was the source of the public disclosure in the first place.

"Bright line" rules of construction have eluded the courts in this area of the FCA. However, a three-step jurisdictional test has emerged in some Circuits while other Circuits have opted for a two-step approach.

For instance, the 11th Circuit in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) announced that the following

> . . . **three part inquiry** determines if jurisdiction exists: (1) have the allegations made by the plaintiff been publicly disclosed; (2) if so, is the disclosed information the basis of the plaintiff's suit; (3) if yes, is the plaintiff an "original source" of that information. See, e.g., *Williams*, 931 F.2d at 1500, n.12. [emphasis added] *Cooper* , *supra*, 565, n.4

The 5th Circuit Court in *Federal Recovery Services, Inc., v. U.S.*, 72 F.3d 447 (5th Cir. 1995) later approvingly cited the standard set forth in *Cooper*. However, the court did not

quote *Cooper's* verbiage exactly. Instead, the court stated that the test must follow the statutory framework and is

> 1) whether there has been a "public disclosure" of allegations or transactions, 2) whether the qui tam action is "based upon" such publicly disclosed allegations, and 3) if so, whether the relator is the "original source" of the information.

Although *Cooper* and *Federal Recovery Services* present different verbiage regarding the test, a three part test has emerged that emphasizes the need to determine whether publicly disclosed information "was the basis of the plaintiff's suit" as is noted in *Cooper*. When the court in *Federal Recovery Services* approvingly cited *Cooper* in this regard, the court emphasized the "based upon" language of subsection "A" of the statute. Thus, reinforcing the need for independent analysis of the "based upon" question as a separate step in the jurisdictional analysis.

The 4th Circuit in the 1994 case of *Siller* even more forcefully emphasized the need for giving "based upon" some independent analysis prior to making a *qui tam* plaintiff qualify as an "original source". The *Siller* court absolutely rejected the analysis of the 2nd Circuit's holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992).

At page 1348, the *Siller* court quoted *John Doe* as holding that an action

> is "based upon" a public disclosure where the relator's allegations are "the same as those that ha[ve] been publicly disclosed . . . . regardless of where the relator obtained his information." 960 F.2d at 324 *Siller , supra,* 1348

In response, the *Siller* court stated that the *John Doe* court "summoned neither reasoning or case authority in defense of its holding." *Siller, supra,* 1348. *Siller*, thereafter, held that the origin of any public disclosure is crucial to the required "based upon" analysis.

As opposed to *John Doe's* presumption that "based upon" merely means "publicly disclosed", the *Siller* court emphasized

that "based upon" must be interpreted as meaning "derived from" if the words of the statute are to be fairly and reasonably interpreted. To hold otherwise would replace one analytical step of the three part test with a mere presumption to the detriment of good policy, legislative intent, and sound construction of the statute.

The D.C. Circuit Court in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) as well as the 9th Circuit Court in the instant case *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996)(App. A, 28) as well as the 10th Circuit Court in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993), however, do not embrace the three-step analysis of either *Siller*, *Federal Recovery Services*, or *Cooper*. Instead, *Springfield*, *Precision*, and *Devlin* follow the presumptive approach consistent with *John Doe*.

In *Springfield*, for instance, the court stated that

> [t]he 1986 *qui tam* amendments set up a **two part test** for determining jurisdiction. [emphasis added] *Springfield, supra*, 651

Consequently, the *Springfield* court stated that if a qui tam plaintiff's allegations have been previously publicly disclosed, the plaintiff must qualify as an "original source". Public disclosure itself, with nothing more, requires "original source" analysis under the two step approach.

The 10th Circuit in *Precision* also appears to embrace a two step analysis of the jurisdictional bar. In *Precision*, the court rejected the *qui tam* plaintiff's argument that his suit was not "based upon" publicly disclosed allegations. Citing judicial economy, the court concluded that

> Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute. *Precision , supra,* 553.

Consequently, the court dropped any "based upon" analysis entirely from inquiry. The court simply stated that a plaintiff's

action may not proceed if allegations were publicly disclosed, unless the plaintiff qualified as an "original source".

In the current case at bar, the 9th Circuit Court in *Devlin* similarly followed the two step approach in interpreting the FCA statute. The court's opinion rested entirely on "original source" analysis after writing the following cursory statement regarding whether the relators' action was "based upon" publicly disclosed allegations:

> Because the action was filed after the newspaper publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction unless the relators were an "original source" of the information upon which the allegations were based.

Consequently, the court immediately presumed "based upon" from the fact of prior disclosure such that "original source" analysis was required.

The 2nd Circuit Courts in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993) and *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) also appeared to embrace a three step analysis of the FCA by recognizing that no "original source" analysis is needed if it is the *qui tam* plaintiff who first disclosed the allegations on which his or her suit is based. See *Kreindler*, *supra*, 1158, and *Dick*, *supra*, 18. Whether such analysis is deemed to be a two step approach with an exception or whether it is deemed a three step approach makes no difference to the fact that "based upon" to those courts meant more than a mere presumption from prior publication.

The instant case was decided under the "presumptive standard" resulting in a jurisdictional bar that would have never applied under *Siller*, *Cooper*, *Federal Recovery Services*, *Dick*, or *Kriendler*. The *qui tam* relators in this case learned of the fraud through personally interviewing and examining records from the same County social worker who was systematically perpetrating the fraud with encouragement from his supervisor prior to any public disclosure. The relators informed the government of the fraud, to no avail, six

weeks before filing suit. Then, approximately seven days before filing suit, the relators also informed the *Mariposa Gazette* before any allegation of the fraud was previously made public by anyone.

Different Circuits have applied different standards and analytical approaches to facts such as described above. As a consequence of mere chance among the conflicting Circuits, the plaintiffs here have been jurisdictionally barred under a two-step analytical approach that has been utterly rejected by the 4th Circuit in *Siller*, the 11th Circuit in *Cooper*, the 5th Circuit in *Federal Recovery Services,* and, apparently, the 2nd Circuit in *Dick* and *Kreindler.*

The 9th Circuit in the instant case only finds support for its two-step analysis in the D.C. Circuit case of *John Doe*, the *Springfield* case out the 2nd Circuit, and the *Precision* case out of the 10th Circuit. Those cases indicate that mere prior publication of allegations contained in a qui tam plaintiff's subsequent suit irrespective of whether the *qui tam* plaintiff was the disclosure automatically requires the relator to qualify as an "original source".

In contrast, the other Circuits first analyze whether a plaintiff "based" his or her allegations on the publicly disclosed allegations by using a three step process that accounts for who made the allegations public and whether the plaintiff's allegations were derived from previously publicly disclosed allegations.

A reading of the FCA that is more consistent with legislature's intent to spur private involvement is found in the three step analysis of *Siller*, *Cooper*, *Federal Recovery Services, Dick* and *Kreindler*. The presumptive automatic bar applied in *Springfield*, *John Doe, Precision*, and, now, *Devlin* has the effect of discouraging private involvement as described below.

B. The Presumption Of "Based Upon" From Merely Showing Publication Fails To

Effectuate The "Based Upon" Language Of The Statute.

The Circuit Courts in *Devlin*, *John Doe*, *Springfield* and *Precision* automatically presume that if allegations or transactions are publicly disclosed prior to the time a qui tam plaintiff filed suit, the plaintiff must qualify as an "original source." Such courts engage in no analysis of the words "based upon" other than automatically presuming an action is "based upon" public disclosure if the plaintiff's allegations bear a similarity to the allegations or transactions that exist in the public domain.

In partial support of this automatic presumption, the *Dick* Court concluded that Congress intended publication to, in essence, be a race so as to encourage the earliest possible disclosure because

> by barring those who come forward only *after* public disclosure of possible False Claims Act violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time. *Dick* , *supra,* 18.

Therefore, the automatic presumption as noted in *Dick* appears to comport with Congressional intent.

While linguistically plausible, the automatic approach does not address congressional intent as to who the potential racing plaintiffs would, in all likelihood, be. If Congress intended quick public disclosure to foment immediate cessation of the fraud, then the race should be between all potential *qui tam* plaintiffs so as to stop the hemorrhaging of public coffers as soon as possible. It is important to note in the instant case that the relators were the first persons to make any disclosure to both the government and the media prior to filing suit.

If Congress intended to cause a race, it would most likely result in a race between the media and all potential qui tam plaintiffs with the practical effect being to force a potential *qui tam* plaintiff to file suit under the Statute simultaneous with

informing the government to avoid being beaten in the race. If a government employee, for instance, leaked to the press or any other person an allegation reported to the government by the *qui tam* plaintiff or if another potential *qui tam* plaintiff published the allegation before the *qui tam* plaintiff filed suit, the plaintiff who brought the allegation to light in the first place would be barred under this analytical construction of the statute .

Furthermore, if Congress intended an automatic bar under subsection "A" of the FCA whenever publication occurred, another practical effect would be to encourage only suits by professional plaintiffs who are skilled in the technical vagaries of FCA law to the almost certain exclusion of conscientious citizens who merely intend to end needless government waste. If the alleged fraud, for instance, was sizable which is the type of fraud the government probably most wants to stop, it would be difficult to "keep a lid on it" long enough to allow an uninitiated *qui tam* plaintiff to seek an attorney and prepare a lawsuit prior to some publication.

Consequently, it seems unlikely that Congress intended, as a practical matter, to encourage private plaintiffs to wait until they fully prepared documents for filing a lawsuit before informing the government of fraud.

C. Congress Intended "Based Upon" To Mean "Derived From" As Opposed To Mere Automatic Presumption.

The *Dick* court resolved the problem noted above by reasoning that if the *qui tam* plaintiff is the one who released the allegations into the public domain, then such a plaintiff would not be barred. See *Dick , supra,* 18.

The *Dick* court also spoke of legislative intent when it alluded to Senator Grassley and Representative Berman as reflected in the 1986 Senate Report when writing that

> the 1986 amendments require that a *qui tam* suit be **based on** information not then publicly disclosed,

> unless disclosed, directly or indirectly, by the person bringing the suit. [emphasis added] *Dick , supra,* 17

Consequently, the *Dick* court as well as the Legislative sponsors of the FCA amendments recognized that when a *qui tam* plaintiff does not learn of the allegations of his or her action through publicly disclosed allegations, such action is not subject to the bar of subsection "A".

Although obscured by the facts of the case, the *Dick* court employed a three-step approach but proceeded to the "original source" analysis at the appellant's request. *Dick , supra,* 16.

Furthermore, other courts have rigorously examined the words "based upon" with the facts of each case prior to engaging in any "original source" analysis. Although the Circuits agree that subsection "A" of the FCA should be examined before subsection "B," there is a conflict among the Circuits about what "based upon" means. See *United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493 (11th Cir. 1991) at 1500, and *Cooper , supra,* 565

In *Siller*, for instance, the 4th Circuit Court specifically noted that the statute required interpretation and application of the words "based upon" during FCA analysis. In rejecting the automatic presumptions of other Circuits, the *Siller* court noted that it preferred

> the plain meaning of the words enacted by Congress over our sister Circuit's as-yet unconsidered assumptions as to the meaning of those words.

The court then reasoned from 1) the construction of the words themselves, 2) practical contraction of the statute, and 3) Congressional intent showed that "based upon" means "derived from". Therefore, the "based upon" language of subsection "A" required a separate inquiry regarding what formed the basis of the plaintiff's suit. If the plaintiff's allegations were not "derived from" any public disclosure, then there is no need to begin the "original source" analysis because the plaintiff is not first barred under subsection "A".

A rigorous analysis of "based upon" like that of *Siller* was also employed in the District Court case of *United States ex rel. LaValley v. First National Bank of Boston,* 707 F.Supp. 1351 (D. Mass. 1988) where the court found that the plaintiff's *qui tam* action was not "based upon" publicly disclosed information because the plaintiff developed his knowledge independently of what was previously publicly disclosed. *La Valley, supra,* 1367.

Consequently, the courts in *Siller*, *Kriendler*, *Cooper* and *LaValley* indicate that Congress intended subsection "A" of 31 U.S.C. §3730(e)(4) to be rigorously examined prior to engaging in "original source" analysis", especially where the relators, as here, are the persons who released the allegations into the public domain. Even the *Dick* court recognized that both Senator Grassley and Representative Berman excepted from the jurisdictional bar any suit "based upon" information in the public domain if the relator was the one who disclosed the allegations in the first place.

Other courts such as those in *John Doe, Springfield*, *Precision*, and, now, *Devlin* which automatically presume the need for "original source" analysis merely because the allegations of a *qui tam* plaintiff's suit are similar to what is publicly disclosed by the time the plaintiff files suit regardless of whether the relator is the person who made the public disclosure, creates a different standard in conflict with other Circuit decisions. Such decisions do not comport with legislative intent and the rules of statutory construction insofar as giving every word of a statute a plain and ordinary meaning as noted under *Siller*.

D. The Existing Spectrum Of Standards, Varied Requirements, And Shifting Burdens Between The Circuits Warrant Intervention And Clarification By This Court.

This court should review this case to settle among conflicting Circuits what bars a potential *qui tam* plaintiff and how that bar is applied. The current conflicts have chilled the

climate in opposition to Congress' intent to promote more private action under the FCA.

The practical effect of allowing both a two-step and a three-step analysis to continue is that plaintiffs in different Circuits will have different burdens in going forward. If, for instance, "based upon" is automatically presumed under the statute, then a defendant must only show public disclosure to trigger the plaintiff's obligation to qualify as an "original source".

However, if "based upon" means "derived from", a defendant must prove some public disclosure, then the burden shifts to the plaintiff to explain why their action is not "derived from" the public disclosure - all under subsection "A", thereby allowing a plaintiff such as in the instant case to show that he disclosed the allegations in the first place. Then, only if the plaintiff fails to show that his or her allegations were not derived from what has been published would the court consider any "original source" analysis.

The case at bar is a prime example of what happens under the differing standards and burdens. Speaking of the relators here, the *Devlin* court emphasized the practical problem of the two-step approach when it stated that "Congress . . . has placed an obstacle in their path to the courthouse door: the "original source" requirements established by §3730(e)(4). *Devlin*, (App. A, 28 n.6). The relators believe the obstacle is not Congress but the court's use of a two-step analysis of the statute.

This question is of substantial import due to the varied analytical approaches employed by the Circuits and their impact on meritorious and non-meritorious actions. It is not proper for meritorious claims to be barred in some Circuits due to the use of a presumptive, automatic standard that other Circuits have rejected as inconsistent with legislative intent and the plain meaning of the statute. It would be equally incorrect for some Circuits to allow claims to proceed that Congress intended to bar.

The Circuit Courts, as in *Siller*, have published opinions in direct conflict with other Circuits. However, the Circuits are not harmonizing their opinions. If anything, they appear to be becoming more entrenched. Now, as in the instant case, an otherwise meritorious claim is barred due to the two-step analytical approach employed by the Ninth Circuit.

Congress intended uniform application and interpretation of the FCA throughout the United States - especially in light of its legislative intent to promote more private actions. However, uncertainty in this area has bred only reticence and uneven application of the law. This circumstance does not promote the discovery and elimination of fraud.

II. THIS COURT SHOULD CLARIFY THAT CONGRESS DID NOT INTEND TO EXCLUDE THE RELATORS IN THIS CASE WHEN CONGRESS REQUIRED "DIRECT" KNOWLEDGE OF INFORMATION UNDER THE "ORIGINAL SOURCE" EXCEPTION OF 31 U.S.C. §3730 (e)(4)(B).

A. It Was The Intent Of Congress To Encourage Private Citizens To Help Stop The Illegitimate Loss Of Federal Funds By Allowing Private Suits Where Government Institutions And Bureaucrats May Have Little Or No Incentive For Stemming Fraud.

In construing a statute, the fundamental rule of construction centers on effectuating legislative intent. "[T]he starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska,* 451 U.S. 259, 265 68 L. Ed.2d 80, 101 S. Ct. 1673 (1981) Therefore, in construing 31 U.S.C. §3730(e)(4) this court should look to the language of the statute itself as well as the intent of Congress to determine its fair and proper meaning.

In support of reinvigorating the *qui tam* plaintiff provisions under the 1986 amendment to the FCA, Representative Badell stated that

> This section [*qui tam* provision] goes a long way toward restoring teeth to a law that was basically defanged in 1943 and rendered useless. I believe it is good policy to encourage citizens to help ensure that their tax dollars are spent well and to pressure the government to follow through on cases raised by those citizens. 132 Cong Record HR22340 (Sept.9, 1986).

Consequently, the *qui tam* plaintiff was granted power under the statute to step in where the government fails to protect itself from fraudulent claims on the Federal treasury.

As stated in both the House and Senate Reports as cited in *Dick*,

> The purpose of the qui tam provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward. H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986); see also Senate Report at 14, 1986 U.S.Code Cong. & Admin.News 5279 (quoting testimony before the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure stating that the amended False Claims Act rewards those who bring "wrongdoing to light"). *Dick , supra*,18.

In the instant action, the State of California and the County of Mariposa allegedly defrauded the Federal Treasury in that Mariposa County agents deliberately inflated Child Protective Services statistics and inflated hours reported on emergency response cases when completing time studies so as to fraudulently increase their federal funding. Such actions occurred with the alleged complicity, or, at least, the apathy of the California State Department of Social Services.

The relators in the instant case attempted to stop Mariposa's reporting fraud by contacting four members of the United

States Congress, two California State Assemblymen, the Federal Bureau of Investigation, The California Auditor General, and the Governor of California - all to no apparent avail.

It was only after filing the instant case that the California State Department of Social Services informed the relators by letter on March 11, 1992 that all information about allegations of Social Services fraud by a County are confidential and cannot be discussed by that agency.

As can be seen from the following section, the relators received their information from a Mariposa County social worker who was actually perpetrating the fraud by systematically inflating statistics and even inflating past statistics for the sole purpose of increasing Federal funding with encouragement from his direct Social Service supervisor.

Under the above described facts where all reports to the government had no apparent effect in stopping future fraud and where no illegitimately claimed funds were returned to the federal coffers, a *qui tam* plaintiff is the person designated by Congress to protect the public interest.

Even though the State of California has an oversight responsibility under 42 U.S.C. §671(a)(13) to ensure compliance with the Federal funding restrictions, both the County and the State have little to no incentive to stop Mariposa's inflated funding statistics; each realize benefits from having additional funds flowing to the state and county. This is one precise circumstance for which Congress enacted the *qui tam* provisions of 31 U.S.C. §3730. In fact, Senator Grassley, the co-sponsor of the 1986 FCA amendment emphasized that " . . . Government does not always work in the best interest of the Government" [Sen Rpt 99-345 99th Congress (1986)]. Consequently, he specifically found the *qui tam* provisions necessary to carry out the purpose of the Act.

If anything, Congress was concerned that the *qui tam* provisions would allow "parasitic" suits by opportunists who

did nothing to stop fraud or bring it to light. The lower court in this case concluded that the instant relators were NOT "opportunistic"[1]. Consequently, this case is not one in which the relators are parasitic opportunists. Despite that conclusion, the Ninth Circuit stated that Congress intended to bar the instant relators under the statute.

Although it is difficult to divine legislative intent from Congressional debates, this court should give special weight to Senator Grassley's statements. As the court noted in *Cooper*, the "sponsor or author of legislation" is "entitled to some weight " in determining legislative intent. *Cooper, supra,* 565, n.3.

In discussing the *qui tam* provisions of the FCA, Senator Grassley, the cosponsor of the 1986 amendments stated in 1990 that

> . . . the Act should be reinterpreted by the courts. In the Act's current guise, there are, and will be, cases where a party defrauds the government, a private plaintiff has become aware of the fraud and commences suit on the government's behalf, the Attorney General declines to intervene, but the court's interpretation of the Act bars jurisdiction, giving the party defendant carte blanche to continue working the fraud. This does not further Congress' intention of spurring private involvement while preventing parasitic suits. False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990)

The current relators find themselves in the very situation addressed by Senator Grassley. They discovered the fraud from a person actually falsifying the records who was thereby perpetrating the fraud. They promptly reported their

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[1] "We do not intend to suggest that the relators were opportunistic. We recognize that they had a hand in the public disclosure of the alleged fraud . . . . Devlin at 6233 fn. 6

allegations to the government through the Office of the California Governor, the California Auditor General, four United States Congressmen, and two California State Assemblymen. Each either did not respond, stated they had no authority to act, or declined to discuss the matter under the guise of Social Services confidentiality restrictions. The Attorney General declined to intervene The relators reported some of their allegations to the media and approximately shortly thereafter they filed suit.

Now, the 9th Circuit Court has employed the "direct" knowledge test of the "original source" requirement so as to stop these relators and virtually all non-employee private plaintiffs from using the FCA to halt systematic, institutional Welfare fraud on the federal treasury. Surely this was not what Congress intended when it amended the statute to "spur" private involvement.

In fact, the Senate Report regarding the 1986 Amendments to the FCA noted that

> changes [were] necessary to halt the so-called 'conspiracy of silence' that has allowed fraud against the government to flourish. *Dick* citing S.Rep. No. 345 99th Cong., 2d Sess. 6 (1986), U.S.Code Cong. & Admin.News 1986, pp 5271.

B. "Direct" Knowledge Is Knowledge That Is Derived From Personal Investigation, Including Interviewing The Perpetrator Of The Fraud And Examining Documents From That Same Perpetrator As In The Case At Bar.

The *Devlin* court rested its decision in this case on the fact that the relators did not have "direct" knowledge of the allegations on which their suit is based because they did not have "firsthand" knowledge of the information. See *Devlin* , (App. A, 29).

Notwithstanding the fact that the relators here received their information from the very person who had systematically

perpetrated the fraud, there is no indication in the legislative history to indicate that Congress sought to bar potential *qui tam* plaintiffs who had secondhand knowledge of fraud through requiring "direct" knowledge. No legislative history discloses any nexus between "direct" knowledge and "firsthand" knowledge.

In fact, the Congressional Record discloses that persons who merely learned of fraud from insiders could bring their own *qui tam* action, thereby demonstrating no Congressional distinction between firsthand and secondhand knowledge by those who report the fraud. *See* Cong.Rec.28580 (1986) See also *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149,1173-4 (3d Cir. 1991) Scirica, J. Dissenting - arguing that there is "no support for the view that the word "direct" was intended to constitute a separate jurisdictional bar." If Congress wanted to bar secondhand suits, it could have easily done so explicitly under the statute. It did not.

Senator Grassley further stated during amendment of the FCA that even persons who learned of fraud secondhand or even through general public disclosure could recover a diminished amount under §3730(d)(1) - even though such plaintiffs did not have independent knowledge of their own. *See* 132 Cong.Rec. 20536 Such statements and amendments recognize that firsthand knowledge was not intended to be a prerequisite to maintaining an action.

The *Devlin* court refers to *Wang*, *Stinson*, and *Houck on Behalf of United States v. Folding carton Admin. Committee*, 881 F.2d 494 (7th Cir. 1989), *cert. denied, sub nom., Certified Plaintiff Class in MDL-250 v. Folding Carton Reserve Fund*, 494 U.S. 1026 and *cert. denied, sub nom., In re Will*, 494 U.S. 1025 (1990) as standing for the proposition that "direct" under the "original source" section of the FCA means "unmeditated by anything else" or as "marked by absence of an intervening agent". Consequently, the current relators were deemed barred because they only learned of the fraud secondhand by merely interviewing the person who

inflated the statistics and by reviewing photocopies of hand printed cards evidencing the fraud.

"'[T]he starting point in every case involving construction of a statute is the language itself. *Watt v. Alaska*, 451 259, 265, 68 L.Ed.2d 80, 1091 S.Ct. 1673 (1981) (citation omitted).'" *Primate Protection League v. Tulane Ed. Fund,* 500 U.S. 72; 111 S.Ct. 1700; 114 L.Ed.2d 134. The *American Heritage Dictionary of the English Language* 373 (1979) defines "direct" as "[p]roceeding or lying in a straight course or line." This more generalized meaning of "direct" is a plausible and more reconcilable meaning of the word "direct" insofar as the FCA is concerned.

If "direct" is viewed as "unmediated by anything else" or "marked by absence of an intervening agent," then, for the most part, insiders and perpetrators would be the only persons with "direct" knowledge of the fraud. Although Congress clearly intended insiders to be potential claimants, the practical effect of *Devlin's* narrow interpretation of "direct" is to stop all private plaintiffs who learn of fraud from an actual perpetrator. Congress intended to promote disclosure and stoppage of the fraud. Therefore, a narrow interpretation of the word "direct" would not appear to further that purpose

The more general meaning of "direct" as "proceeding from" more readily effectuates Congress' intent under the FCA. Instead of focussing on whether a plaintiff sees fraud with his or her own eyes while it is then occurring or focussing on whether a plaintiff views a photocopied document rather than an original while it is being prepared, the more general meaning of "direct" focuses on whether the knowledge of fraud has proceeded to the plaintiff in a straight line (ie. in a direct manner).

In the instant case, the plaintiff learned of the fraud from the perpetrator. It is hard to conceive of a more direct line or manner than that. Congress did not intend to limit *qui tam* plaintiff's to those who, in essence, look over a perpetrator's shoulder to catch them in the act of committing some fraud that usually occurs in an office behind closed doors. Indeed, if

that were the case virtually all plaintiff's would be barred because there are always mediating and intervening agents such as copy machines, telephones, and computers. Such a narrow construction of "direct" would create even more confusion in applying the FCA.

In addition to ascertaining the plain meaning of the words of a statute, statutory construction requires looking "to the design of the statute as a whole and to its object and policy" *K-Mart Corp., V. Cartier, Inc.,* 486 U.S. 281, 291 (1988) See also *Crandon v. United States,* 494 U.S. 152, 158 (1990) In the instant case, such interpretation would include Congress' intent to encourage more private actions. A narrow interpretation of "direct" would hinder that policy.

In the current case, if Congress intended only those who, actually witnessed the statistic sheets being directly inflated, inscribed, and altered by the social worker, no private plaintiff would be able to stop such fraud through a qui tam action. Social workers fill out their paperwork in a private office under strict requirements of confidentiality under state and federal law.

Another uniqueness of the case at bar is that special statutes create a veil of secrecy behind which social workers and social service agencies function. Virtually no *qui tam* plaintiff would be able to pierce this veil but for some voluntary disclosure by an insider. Because Congress intended to halt fraud through private FCA suits, allowing only suits by insiders against an agency that has no incentive to police itself would potentially allow perpetuation of the fraud with impunity under a narrow interpretation of "direct".

Social workers, for instance, are bound to silence under 45 C.F.R. § 205.50(F)(iii) because"[d]isclosure of any information that identifies by name or address any applicant of recipient to any Federal, State, or local committee or legislative body... is prohibited". 45 C.F.R. § 205.50(F)(iv) also states that "[p]ublication of lists of names of applicants and recipients will be prohibited".

Regarding confidentiality, 45 C.F.R. § 1340.14(i) further states that (1) The State must provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." Under this scenario, private plaintiff's are already limited in their ability to learn of information to support an FCA action. See also California Welfare and Institutions Code § 10850 which provides criminal penalties for unauthorized disclosure of Social Service Agency information.

C. In The Confidential Arena Of Welfare Funding Claims By Local And State Governments, Congress Did Not Intend To Bar The Instant Plaintiff Or Other Private Relators Through The "Direct" Knowledge Test Because Such An Interpretation Would Bar All Private Relators Who Are Not Employees Of Government Welfare Agencies.

Even under the most labored and narrow meaning of the "direct" knowledge requirement of the FCA, a confession of fraud from a perpetrator is direct knowledge. A confession may only be circumstantial and not direct evidence of fraud. But, it is certainly "direct" because it proceeded straight from the perpetration. Regardless of whether the worker's confession is deemed firsthand information or secondhand information, the confession and photocopied records meet the "direct" requirement of the FCA.

It is unlikely that Congress intended to bar a private plaintiff from maintaining a suit where the actual perpetrator who falsified records only confessed to the relator and not to any government agent so as to stop the continuing fraudulent practice.

Consequently, Congress did not intend to stop the relators in this case from maintaining an action under the FCA. Limiting access by these and similarly situated relators would allow unfettered fraud on the national treasury because only

employees who actually see the fraud would be able to maintain an action if publication had occurred. Such an interpretation would in the best case slow the reporting of fraud and in the worst case, as here, it would eliminate *qui tam* access to the courts.

In the unique arena of county and state Social Service Agencies, the veil of secrecy and confidentiality perpetuates institutionalized lethargy and apathy regarding inflating statistics to illegitimately tap the federal treasury. Though it is nearly impossible to pierce the veil, Congress specifically reinvigorated the *qui tam* provisions of the FCA in 1986 to break the conspiracy of silence and inform the indulgent to imbibe no more.

In the modern climate of Welfare reform and decreased federal resources, it is unfair to the needy of one state to allow shrinking resources to be misdirected to states that deliberately inflate statistics and illegitimately claim a share of welfare dollars. To bar the relators in this case misinterprets the statute and fails to promote the aims of Congress in amending the FCA.

CONCLUSION

For the foregoing reasons, the realtors respectfully request this court to grant this petition for a Writ of Certiorari to the Ninth Circuit to clarify and settle the issues stated herein.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. WILLIAM DEVLIN; STANLEY H. SIDICANE; ROD KODMAN, *Plaintiffs-Appellants,*	)	No. 93-16729
v.	)	D. C. No. CV-92-05086 REC
STATE OF CALIFORNIA; COUNTY OF MARIPOSA MARIPOSA; and TOM ARCHER, *Defendants-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
March 15, 1995--San Francisco, California

Filed May 24, 1996

Before: William A. Norris, Charles Wiggins, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Government Law/Torts

The court of appeals affirmed a district court judgment. The court held an individual who learns secondhand of allegations of fraud against the federal government does not have "direct" knowledge for purposes of bringing a False Claims Act *qui tam* action.

William Cotey, an employee of the Social Services Department of Mariposa County (SSD), informed appellants Rod Kodman and William Devlin of SSD's alleged fraud upon the federal government. SSD allegedly inflated client statistics in order to qualify for increased federal funding under federal programs.

Shortly thereafter, Devlin, Cotey, and Cotey's wife met with reporter Jerry Rankin and told him about the alleged fraud. The newspaper published an article by Rankin describing SSD's allegedly fraudulent conduct.

Five days after the article appeared, Devlin and Kodman filed a *qui tam* action under the FCA. The district court dismissed the action for lack of subject matter jurisdiction on the ground that the relators were not an "original source" of the information on which the allegations of fraud were based. The court held that the relators were not an original source because their knowledge of the SSD's alleged fraud was not "direct and independent." The relators appealed.

[1] Because the action was filed after the newspaper publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction unless the relators were an "original source" of the information upon which the allegations based.

[2] In this case, the relators' knowledge was not direct and independent. They did not discover firsthand the information underlying the allegations of fraud. The relators did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but rather derived it secondhand from Cotey, who had firsthand knowledge of the alleged fraud as a result of his employment. [3] Although Devlin contacted persons who told him that they did not receive services for which SSD allegedly billed the government, the verification Devlin obtained from those persons did not add anything of significance to the information that the relators obtained from Cotey. The knowledge that Devlin obtained did not make a genuinely valuable contribution to the exposure of the alleged fraud.

[4] The "original source" requirements are intended to bar parasitic suits through which a plaintiff seeks a reward even though he or she has contributed nothing significant to exposure of the fraud.

COUNSEL

William Devlin, Fresno, California; Stanley H. Sidicane, Opelika, Alabama; Rod Kodman, Merced, California, in Pro Per for the plaintiffs-appellants.

Steven Wayne Dahlem, Mariposa, California; Theodore Garelis, Deputy Attorney General, Sacramento, California, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

This is a *qui tam* action filed under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 (1988), based upon allegations that the Social Services Department of Mariposa

County ("SSD") has defrauded the United States government by inflating client statistics in order to qualify for increased federal funding under various federal programs. The district court dismissed the action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that the relators were not an "original source" of the information on which the allegations of fraud were based as required by §3730(e)(4) of the FCA.[2] We affirm.

I

The facts relevant to the original source issue are not in dispute: During the week of January 3, 1992, relators Rod Kodman and William Devlin were informed of the alleged fraud by William Cotey, an SSD employee who had participated in the fraud by falsifying records. Shortly thereafter, relator Devlin, Cotey, and Cotey's wife met with Jerry Rankin, a *Mariposa Gazette* reporter, and told him about the alleged fraud. On February 6, 1992, the *Mariposa Gazette* published an article by Rankin describing SSD's allegedly fraudulent conduct. Five days after Rankin's article appeared, the relators filed this *qui tam* action.

[1] Because the action was filed after the *Mariposa Gazette* publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction unless the relators were an "original source" of the information upon which the allegations

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[2]Section 3730(e)(4) of the FCA provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. §3730(e)(4).

were based.[3] 31 U.S.C. §3730(e)(4)(A); *United States ex rel. Fine v. Chevron,* 72 F.3d 740, 743 (9th Cir. 1995) (en banc). The district court held that the relators were not an original source because their knowledge of the fraud allegedly perpetrated by SSD was not "direct and independent" within the meaning of § 3730(e)(4).[4]

II

Only two Ninth Circuit cases address the question of what constitutes "direct and independent" knowledge for purposes of § 3730(e)(4). In both cases, we held that the relator had "direct and independent" knowledge because he had discovered the information underlying his allegations of wrongdoing through his own labor.[5] In *Wang v. FMC*

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[3]The exception to § 3730(e)(4)(A)'s bar against suits based on publicly disclosed allegations for suits brought by the Attorney General is plainly inapplicable.

[4]To be an "original source," a relator must show that he or she has "direct and independent knowledge of the information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), "voluntarily provided the information to the Government before filing" his or her *qui tam* action, *id.*, and "had a hand in the public disclosure of the allegations that are part of [his or her] suit", *Wang v. FMC Corp.*, 375 F. 2d 1412, 1418 (9th Cir. 1992). It is undisputed that the relators have satisfied the latter two requirements.

[5]A panel of this court reached a similar result in *Unite States ex rel. Fine v. Chevron,* 39 F.3d 957 (9th Cir. 1994), holding that an auditor-relator had "direct and independent" knowledge of the information underlying his *qui tam* action because his "own labor" -- reviewing audit sheets and other financial records -- led to his discovery of the allegedly fraudulent payments. *Id.*. at 961-62. The panel opinion was vacated by the en banc court that reheard the case. *Fine,* 72 F.3d at 741 n.1. The en banc court did not reach the question of whether Fine's knowledge was direct and independent because it held that Fine failed the "voluntary" prong of the original source test. *Id.* at 743.

Other circuits have likewise held that knowledge is "direct" when it derives from information obtained firsthand through the relator's own labor. *Cooper ex rel. United States v. Blue Cross & Blue Shield of Florida, Inc.* 19 F.3d 562, 568 (11th Cir. 1994) (per curium) (relator's knowledge of an alleged fraud by a Medicare secondary payer is direct because it was acquired through "three years of [the relator's] own claims processing in, research, and correspondence with members of Congress and [the Health Care Financing Administration]");

Corp., 975 F.2d 1412 (9th Cir. 1992), we held that an engineer-relator who had been called in to study a problem with a product had "direct and independent" knowledge of the problem because "he saw [it] with his own eyes" and his knowledge was "unmediated by anything but [his] own labor." *Id.* at 1417. Similarly, we held in *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), *cert denied*, __ U.S. __, 114 S. Ct. 1543, 128 L. Ed. 2d 195 (1994), that an employee of a government subcontractor who brought a *qui tam* action alleging falsified testing had "direct and independent knowledge" of the allegations because "he acquired [his knowledge] during the course of his employment [by the subcontractor]." *Id.* at 411.

[2] In this case the relators' knowledge was not direct and independent because they did not discover firsthand the information underlying their allegations of fraud.[67] They did

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Houck ex rel. United States v. Folding Carton Admin., 881 F.2d 494, 505 (7th Cir. 1989) (attorney-relator had direct knowledge of alleged fraudulent distribution of settlement because his knowledge resulted from his involvement in assisting late class action claimants in recovering money out of settlement order funds), *cert. denied*, 494 U.S. 1026 (1990); *see also United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994) (defining "direct" for purposes of § 3730(e)(4)(A) as "marked by absence of an intervening agency, instrumentality, or influence" and holding that attorney-relator did not have direct knowledge because his information of the alleged wrongdoing, obtained through a memorandum produced in discovery prior lawsuit, came through two intermediaries: the company employee who was responsible for the memorandum and the discovery process).

[7]The relators argue that they had direct and independent knowledge of the information upon which the allegations were based because they had evidence of the fraud prior to the public disclose of the allegations. Relator Devlin interviewed Cotey about the fraud during the week of January 13, 1992, that is, at least two weeks before the *Mariposa Gazette* article describing the fraud appeared. Relator Kodman also received on January 21, 1992, 15 days before the article appeared, a letter from Cotey outlining the fraud and providing him with ledger cards and sheets documenting the allegedly fraudulent work. The fact that the relators had evidence of the fraud prior to the public disclosure of the allegations establishes that their knowledge was "independent". *See*

not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it secondhand from Cotey, who had firsthand knowledge of the alleged fraud as a result of his employment at SSD.

[3] The relators argue that their knowledge of the alleged fraud was direct because of relator Devlin's personal efforts to verify the accuracy of the information the relators obtained from Cotey. It is true that Devlin contacted persons who told him that they did not receive services for which SSD allegedly billed the government. The question, however, is whether the verification Devlin obtained from these persons added anything of significance to the information the relators obtained from Cotey. We do not believe it did. The information Cotey disclosed to the relators is that SSD had fraudulently billed the government for services to persons who had not received the services, together with a description of those services and a list of the names of the persons SSD claimed to have received the services. Armed with all that information, anyone could easily have done what Devlin did: contact persons on Cotey's list and ask them whether they had in fact received the services that had been described by Cotey. That is all Devlin did, and it is virtual certainty that federal investigators would have done precisely the same thing once the information provided by Cotey had been made public. Viewed in this light, the knowledge Devlin obtained did not make a genuinely valuable contribution to the exposure of the alleged fraud.

Wang, 975 F.2d at 1417. Implicit in the relators' argument, therefore, is the contention that a showing that knowledge is "independent" is sufficient to satisfy § 3700(e)(4)'s requirement that an "original source" have "direct and independent" knowledge. The statute, however, is clear that an "original source" must have knowledge that is *both* direct and independent. *See* 31 U.S.C. § 3700(e)(4)(B) ("original source" means an individual who has direct *and* independent knowledge") (emphasis added)'; *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703, (8th Cir. 1995) (§3700(e)(4)(B) imposes a conjunctive requirement of both independent and direct knowledge); *Springfield Terminal Ry.* 14 F.3d at 656 (same); Stinson, 944 F.2d at 1160 (same). *But see Stinson*, 944 F.2d at 1172-74 (Scirica, J., dissenting) (arguing that Congress did not intend the word "direct" to constitute a separate jurisdictional bar).

The facts of this case thus differ materially from the facts in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), where the relator's own personal knowledge was essential to his conclusion that a fraud had been committed. *Id.* at 656-57 (employer-relator had direct and independent knowledge that a labor arbitrator had fraudulently billed the government for services not actually rendered because the relator's personal knowledge of the arbitration process and his interviews with the persons with whom the arbitrator had allegedly worked were essential to the conclusion that a fraud had been committed).

[4] Our holding is in keeping with the purpose of the FCA, which aims at ferreting out fraud by encouraging persons with firsthand knowledge of alleged wrongdoing to come forward. It is "the cooperation of individuals who are either *close observers or otherwise involved* in the fraudulent activity" that Congress sought to enlist through the *qui tam* provisions of the FCA. S. Rep. No. 345, 99th Cong., 2d Sess. 4. *reprinted in* 1986 U.S.C.C.A.N., 5269 (emphasis added); *see also United States ex rel. Stinson, Lyons, Gerlin, & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (FCA seeks to "encourage persons with *first-hand* knowledge of fraudulent misconduct" to come forward) (emphasis added). Conversely, the original source requirements of §3730(e)(4) are intended to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of the fraud. As our court and others have explained, the 1986 amendments to the FCA steer a course between an overly restrictive interpretation of the FCA on the one hand, as exemplified by *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (barring jurisdiction whenever the Government possessed the information on which the claim was brought, even if it was the relator who had provided the government with the information), and an unrestrained permissiveness on the other, as exemplified by *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (allowing *qui tam* actions based solely on information already publicly disclosed). In other

words, the FCA has been shaped by Congress's "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."[8] *Springfield Terminal Ry.*, 14 F.3d at 649; *see also Wang*, 975 F.2d at 1418-19, *Stinson*, 944 F.2d at 1154.

In holding as we do, we join the three other circuits that have considered this question, all of which have also decided that a person who learns secondhand of allegations of fraud does not have "direct" knowledge within the meaning of 31 U.S.C. § 3730(e)(4)(B). *See United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("a person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the [FCA]"); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1159 (2d Cir.) (attorney-relator who obtains information of alleged wrongdoing through disclosures made by alleged wrongdoer in discovery in a previous lawsuit does not have significant direct and independent knowledge; neither the collateral research and investigations conducted by the attorney significance of the disclosures were enough to establish that he had direct and independent knowledge), *cert. denied*, 508 U.S. 973 (1993); *Stinson, 944 F.2d at 1161* ("nothing . . . would bar suit by someone who learned of the fraud from an insider, *if* the information had not yet been publicly disclosed") (emphasis added). *But see id.* At 1173 (Scirica, J., dissenting) ("If Congress had intended to bar all "secondhand" relators, it could have done so explicitly, without predicating the bar on public disclosure.").

---

[8]We do not intend to suggest that the relators in this case were opportunistic. We recognize that they had a hand in the public disclosure of the alleged fraud through their participation in the meeting with the *Mariposa Gazette* reporter. Congress, however, has placed an obstacle in their path to the courthouse door: the "original source" requirements established by 3730(e)(4).

The judgment of the district court dismissing the relators' complaint for lack of subject matter jurisdiction is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Filed July 19, 1993

UNITED STATES ex rel. William Devlin, et al., Plaintiff,	) No. CV-F-92-5086 REC
v.	) ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION
TOM ARCHER, et al., Defendant.	)

On July 12, 1993 the court heard the Motion to Dismiss filed by defendants Tom Archer and the county of Mariposa.[9] Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion for the reasons set forth herein.

The First Amended Complaint is brought by relators William Devlin, Stanley Sidicane, and Rod Kodman, pursuant to the False Claims Act, 31 U.S.C. §§ 3729 et seq. The First Amended Complaint is an action to recover damages and civil penalties on behalf of the United States arising out of false claims presented by defendants to the United States to secure

[9]This motion has been joined by defendant State of California.

monies paid under the Child Welfare Act of 1980, 42 U.S.C. §§5010 et seq., and other federal programs providing financial assistance and/or payments to state and county agencies.

Defendants move to dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure.[10]

31 U.S.C. § 3730(e)(4) provides in pertinent part as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting, Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and had voluntarily provided the information to the Government before filing an

---

[10] Relators argue that because defendants have attached exhibits to their motion to dismiss, this court must convert this motion to one for summary judgment. Relators are incorrect. Only a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is required to be converted to a motion for summary judgment.

action under this section which is based on this information.

A. Public Disclosure.

Referring the court to an article published in the Mariposa Gazette on February 6, 1992, five days before the complaint commencing this action was filed, defendant argue that this court lacks subject matter jurisdiction because this action is based on public disclosure in the news media.

Relators concede that the article in the Mariposa Gazette sets forth in this action. However, because the relators had interviewed William Cotey, the source for the article in the Mariposa Gazette prior to the interview leading to the publication of the article and because the relators' interview of Cotey and their own investigation resulted in evidence not mentioned in the Mariposa Gazette article, it cannot be concluded that this action is based upon public disclosure to the news media.

In arguing that these facts suffice for the court to conclude that this action is not based on public disclosure, relators cite Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992), as recognizing a distinction

between allegations of fraud and all information published in the news media to be publicly disclosed information within the meaning of Section 3730(e)(4), the public disclosure must contain both the allegation and all of the information proving the allegation.

The court does not agree with the relators' reading of Wang. It must be noted that a finding of "public disclosure" within the meaning of the statute before there is a need for a qui tam plaintiff to show that he is the original source of the information. Wang, supra, 375 F.2d at 1416. Therefore, if there has been no public disclosure, the qui tam plaintiff need not prove his status as the original source. In Wang, the Ninth Circuit concluded that the relator's allegations had not been publicly disclosed. Because there had been no public disclosure of the relator's allegations, the relator had to show that he had direct and independent knowledge of the information on which the allegations were based. It was at this point in the opinion that the Ninth Circuit made the distinction between allegations and proof. 975 F.2d at 1417-1420. Therefore, the portion of the Wang opinion relied upon by the

relators in attempting to refute defendants' assertion that there has been public disclosure is not on point.

The relators also refer the court to United States ex rel. Stinson v. Prudential Insurance Company, 944 F.2d 1149, 1960 (3d Cir. 1991) as holding that "[a] party with knowledge of fraud against the Government ought to be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure." Therefore, the relators argue, the court should conclude that this action was not based on public disclosure of allegations set forth by the news media because the relators provide evidence not mentioned in the Mariposa Gazette article.

Again, the relators are misreading the case. In Stinson, the quoted portion of the opinion involved the issue whether relator in that case was an original source within the meaning of the statute. As noted above, the issue of original source does not arise unless it is determined that there has been no public disclosure.

Here, the court concludes that there has been public disclosure of the allegations or transactions upon which this

action is based. The fact that the relators claim to have had additional information to that reported in the newspaper article should not change this conclusion. As noted, the relators have cited no supportive case authority. Frankly, the distinction being made by the relators does not make sense, especially when the difference in the statute between "allegation or transaction" and "information" is noted. Therefore, the issue arises whether any of the relators are the "original source" within the meaning of the statute.

B. Original Source.

As noted above, Section 3700(e)(4) provides two exception [sic] allowing the court to exercise subject matter jurisdiction in an action in which public disclosure of the allegations or transactions at issue in the qui tam suit predates the commencement of the action. The relevant exception at issue here is whether any of the relators bringing this action are "an original source of the information."

The relators contend that they are an original source of the information such that the exception to the lack of subject matter jurisdiction should apply. In so arguing, they submit

declarations executed by relators Rod Kodman and William Devlin.

As noted above, the Ninth Circuit in Wang discussed in some detail the "original source" requirement. 975 F.2d at 1417-1420. In addition, the Third Circuit discussed the requirement in Stinson, supra, 944 F.2d at 1160-1161.

The court concludes that none of the relators have shown that they are original source of the information within the meaning of Wang. There is no question that Devlin, by his participation in the interview with the Mariposa Gazette reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." Wang, 975 F.2d at 1418. However, the court does not read either Kodman or Devlin's declarations as stating or being based on anything more that what William Cotey told them orally and in writing and through the documentary evidence provided to them by Cotey. Although the relators contend that Cotey's information and evidence relayed to them as well as the results (conclusorily described) of the results of Devlin's investigation of the persons whose names he received from Cotey gives them direct and

independent knowledge of the information, the court is not persuaded that this assertion is relevant. As the Ninth Circuit in Wang cautioned:

> It is important to note that under the rule we adopt today, all those who 'directly or indirectly' disclose an allegation might qualify as its original source . . . Anyone who helped to report the allegation to either the government or the media would have 'indirectly' helped to publicly disclose it. If, however, someone republishes an allegation that already has been publicly disclosed, he cannot bring a qui tam suit, even if he had 'direct and independent knowledge' of the fraud. He is no 'whistleblower.' A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics . . . .
>
> 975 F.2d at 1419.

At oral argument the relators contended that the court must conclude that they are the original source within the meaning of the statute because William Cotey, as a wrongdoer, cannot be an original source. The relators cite no authority for this proposition and the court can find none.

ACCORDINGLY, IT IS ORDERED that the defendants' Motion to Dismiss in granted.

IT IS FURTHER ORDERED that this action is dismissed for lack of subject matter jurisdiction.

Dated: July 16, 1993

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Filed July 29, 1993

UNITED STATES ex rel. William Devlin, et al., Plaintiff,	) No. CV-F-92-5086 REC) ORDER CORRECTING
v.	) ORDER DISMISSING) ACTION FOR) LACK OF SUBJECT
TOM ARCHER, et al., Defendant.	) MATTER) JURISDICTION

The court hereby corrects the Order Dismissing Action for Lack of Subject Matter Jurisdiction filed on July 19, 1993 nunc pro tunc as follows:

A) The sentence on lines 25-26 on page 3 and lines 1-2 on page 4 is corrected to read: It must be noted that there must be a finding of "public disclosure" within the meaning of the statute before there is a need for a qui tam plaintiff to show that he is the original source of the information.

B) The sentence on lines 2-4 on page 5 is corrected to read: As noted above, the issue of original source does not arise unless it is determined that there has been public disclosure.

The Order Dismissing Action for Lack of Subject Matter Jurisdiction filed on July 19, 1993 otherwise remains as it was issued.

Dated: July 26, 1993

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Filed September 2, 1993

UNITED STATES ex rel. William Devlin, et al., Plaintiff,	) No. CV-F-92-5086 REC
v.	) ORDER DENYING) MOTION FOR) RECONSIDERATION
TOM ARCHER, et al., Defendant.	)

On July 19, 1993, the court issued its Order Dismissing Action for Lack of Subject Matter Jurisdiction. On July 26, 1993 the court issued its Order Correcting Order Dismissing Action for Lack of Subject Matter Jurisdiction Nunc Pro Tunc.

Plaintiffs have filed a Motion for Reconsideration. The court denies this motion for the reasons set forth herein.

In these orders, the court dismissed this action for lack of subject matter jurisdiction on the ground that the relators were not an original source of the information on which the allegations are based within the meaning of 31 U.S.C. § 3730 (e) (4). Section 3730(e)(4) provides in pertinent part as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based . . . .

In the order, the court concluded that there had been public disclosure of the allegations upon which this action is based because of an article published in the Mariposa Gazette five days before the complaint commencing this action was filed. Because of this conclusion, the court went on to determine whether defendants were an "original source" within the meaning of the statute. In ruling that they were not, the court stated in pertinent part as follows:

> The relators contend that they are an original source of the information such that the exception to the lack of subject matter jurisdiction should apply. In so arguing, they submit declarations executed by relators Rod Kodman and William Devlin.
>
> As noted above, the Ninth Circuit in Wang discussed in some detail the "original source" requirement. 975 F.2d at 1417-1420. In addition, the Third Circuit discussed the requirement in Stinson, supra, 944 F. 2d at 1160-1161.
>
> The court concludes that none of the relators have shown that they are original source of the

information within the meaning of Wang. There is no question that Devlin, by his participation in the interview with the Mariposa Gazette reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." Wang, 975 F.2d at 1418. However, the court does not read either Kodman or Devlin's declarations as stating or being based on anything more that what William Cotey told them orally and in writing and through the documentary evidence relayed to them as well a the results (conclusorily described) of the results of Devlin's investigation of the persons whose names he received from Cotey gives them direct and independent knowledge of the information, the court is not persuaded that this assertion is relevant. As the Ninth Circuit in Wang cautioned:

> It is important to note that under the rule we adopt today, all those who 'directly' disclose an allegation to either the government or the media would have 'indirectly' helped to publicly disclose it. If, however, someone, republishes an allegation that already has been publicly disclosed, he cannot bring a qui tam suit, even if he had 'direct and independent knowledge' of the fraud. He is no 'whistleblower.' A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics . . . .

975 F.2d at 1419.

At oral argument the relators contended that the court must conclude that they are the original source within the meaning of the statute because William Cotey, as a wrongdoer, cannot be an original source. The relators cite no authority for this proposition and the court can find none.

The relators, referring the court to United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13 (2d Cir. 1990), argues that the term "original source" refers to the original source of the public disclosure of the fraud. Because this court concluded in its order that "[t]here is no question that Devlin, by his participater [sic] in the interview with the Mariposa Gazette reporter, 'had a hand in the public disclosure of allegations thta [sic] are part of [this] suit . . . '", the relators assert that they meet the requirements to be an "original source' as the term has been interpreted by the Second Circuit in Long Island Lighting.

The relators are misreading Long Island Lighting. In Long Island Lighting, the Second Circuit stated in pertinent part:

> In asserting the pertinent language of the statute, we note that 'original source' is expressly defined in §3730(e)(4)(B). A straightforward reading of §3730(e)(4)(B) indicates that to be an 'original source' a qui tam plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based, and (2) have voluntarily provided such information to the government prior to filing suit. A close textual analysis combined with a review of the legislative history convinces us that under § 3730(e)(4)(A) there is an additional requirement that a qui tam plaintiff must meet in

> order to be considered an 'original source,' namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which suit is based.

912 F.2d at 16. This additional requirement in no way changes the court's conclusion that the relators were not an original source. The only way that this additional requirement might change the court's conclusion is if the record before the court establishes that the relators were the original source of the information within the meaning of Section 3730(e)(4)(B). They were not.

The relators further assert that, for strategic reasons they did not disclose the full extent of the documentary evidence in their possession at the time defendant's Motion to Dismiss. Attached to this Motion for Reconsideration is another declaration executed by William Devlin. However, this newly provided information is no different than that provided to the court by the relators in connection with the Motion to Dismiss. Therefore, this information in no way causes the court to reconsider its ruling.

ACCORDINGLY, IT IS SO ORDERED that the plaintiffs' Motion for Reconsideration is denied. IT IS

FURTHER ORDERED that oral argument set for September 7, 1993 is vacated.

Dated: September 2, 1993

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 26 1996
CLERK

No. 96-312

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, ex rel.
WILLIAM DEVLIN, ROD KODMAN,

Petitioners,

v.

STATE OF CALIFORNIA, COUNTY OF
MARIPOSA, and TOM ARCHER,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court has jurisdiction over a *qui tam* action brought pursuant to the False Claims Act (31 U.S.C. §§ 3729 et seq.) where the allegations upon which it is based were publicly disclosed prior to the filing of the complaint and where the relators had no direct and independent knowledge of the information on which the allegations are based.

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents State of California, County of Mariposa, and Tom Archer respectfully ask the Court to deny the petition for writ of certiorari filed by petitioners/relators William Devlin and Rod Kodman ("relators") for the reasons stated below.

STATEMENT OF THE CASE

On February 11, 1992, relators filed a sealed *qui tam* suit pursuant to the False Claims Act (31 U.S.C. §§ 3729 et seq.) against the State of California, numerous counties of that state, and various officials of those counties.

On September 25, 1992, relators filed a sealed First Amended Complaint naming only the State of California, the County of Mariposa, and Tom Archer, an official of the County of Mariposa, as defendants. The First Amended Complaint alleged in pertinent part that beginning sometime in 1990, the Social Services Department of Mariposa County, at the direction of Tom Archer, who was then Unit Supervisor, began to take steps to fraudulently increase its federal funding by inflating case report statistics and creating false files.

On October 22, 1992, the district court entered an order stating that the United States had declined to intervene in the suit and that the complaint could be unsealed.

On December 9, 1992, defendants County of Mariposa and Tom Archer answered the First Amended Complaint. Defendant State of California filed its answer to the First Amended Complaint on June 10, 1993.

On June 11, 1993, defendants County of Mariposa and Tom Archer filed a motion to dismiss the action on the ground that the district court lacked subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4), in that the allegations upon which the action is based were publicly disclosed prior to the filing of the complaint and the relators were not the "original source" of the information. Defendant State of California joined in the motion to dismiss.

On July 19, 1993, the district court filed an Order Dismissing Action for Lack of Subject Matter Jurisdiction. The district court concluded that it lacked subject matter jurisdiction because there had been public disclosure of the allegations or transactions upon which the action is based prior to the filing of the complaint, and the relators are not the "original source" of the information. Judgment dismissing the action for lack of subject matter jurisdiction was entered on July 22, 1993. Thereafter, on July 26, 1993, an Order Correcting Order Dismissing Action for Lack of Subject Matter Jurisdiction *Nunc Pro Tunc* was filed correcting clerical errors in the order of dismissal.

On July 29, 1993, relators filed a motion for reconsideration of the district court's order dismissing the action. On September 2, 1993, the district court denied relators' motion for reconsideration. Relators filed a timely notice of appeal on September 10, 1993.

On May 24, 1996, the Ninth Circuit Court of Appeals affirmed the judgment of the district court.

STATEMENT OF FACTS

On February 6, 1993, the *Mariposa Gazette* newspaper published an article entitled "Grand Jury asked to probe Child Protective Services" detailing certain allegations concerning the Child Protective Services ("CPS") agencies in Mariposa and Madera Counties.[1] According to the article, William Cotey, a former employee of Mariposa County CPS, requested the FBI and the grand juries in both Mariposa and Madera Counties to investigate the operations of the local CPS agencies. The article stated that "[o]ne element of Cotey's complaint to the Mariposa Grand Jury pertains to record-keeping of cases involving assistance to the homeless and the protective services to adults and children." App. 3. The article further states that "[c]entral to his complaint is a meeting Cotey attended with Archer and four fellow workers sometime in the past three years" in which "Cotey, in his letter to the Grand Jury, recalls that Archer – then head of the unit, now head of the Human Services Department – told them 'our CPS statistics were too low and that we needed to use everything we could to inflate these statistics to increase our funding.' " App. 3. The article also discussed allegations concerning the creation of false files and inflation of caseloads.

According to the declaration of relator William Devlin dated March 21, 1993, sometime prior to January 20, 1992, William Cotey contacted relator Rod Kodman

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[1] The February 6, 1993, *Mariposa Gazette* article is reprinted at App. 1 of the Appendix to this Joint Brief.

and informed him that he (Cotey) had information concerning fraud committed by employees of Mariposa County.[2] In his declaration, Devlin also stated that, during the week of January 13, 1992, Devlin interviewed Cotey regarding the alleged fraud and that "[i]t is at this time that the Relators received the information which formed the basis for this false claims action." App. 16. Mr. Devlin further stated in his declaration that "[t]he week before the February 6, 199[2] article appeared in the Mariposa Gazette, Mr. William Cotey, his wife Deborah Cotey and [Devlin] went to the Mariposa Gazette and gave a reporter, Jerry Rankin[,] the information that was contained in the article of February 6, 199[2]."[3] App. 16. The Declaration of Jerry Rankin dated June 25, 1993, confirmed the discussion with Mr. and Mrs. Cotey and Mr. Devlin.[4] Rankin further stated in his declaration that "[s]ometime after this conversation, [Rankin] contacted William Cotey again and had a conversation with him during which he gave me further details regarding this alleged fraud." App. 18.

On February 11, 1992, five days after publication of the *Mariposa Gazette* article, relators filed the action upon which this petition is based in the United States District Court for the Eastern District of California.

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[2] The March 21, 1993, Declaration of William Devlin is reprinted at App. 15 of the Appendix to this Joint Brief.

[3] The Declaration of William Devlin dated March 21, 1993, erroneously stated that the *Mariposa Gazette* article was published on February 6, 1993, instead of February 6, 1992.

[4] The June 25, 1993, Declaration of Jerry Rankin is reprinted at App. 18 of the Appendix of this Joint Brief.

In their First Amended Complaint, filed September 25, 1992, relators allege that Tom Archer directed employees of the Social Services Department of the County of Mariposa, California to fraudulently create false files to show that an investigation had been, or was being, carried on relating to child or adult abuse. Relators further allege that the purpose of this fraudulent activity was to inflate statistics of abuse cases handled by the County of Mariposa in order to increase federal funding.

ARGUMENT

I.

THERE IS NO CLEAR CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE PRECISE MEANING OF THE PHRASE "BASED UPON" IN 31 U.S.C. § 3730(e)(4). MOREOVER, THE FACTS OF THIS CASE DO NOT PRESENT THAT ISSUE

Relators argue that their Petition for Writ of Certiorari should be granted to resolve a conflict among circuits of the United States Court of Appeals. In support of their argument, they state that although the Ninth Circuit found this action to be barred by the provisions of 31 U.S.C. § 3730(e)(4), it would not have been barred in the Fourth, Eleventh, Fifth and Second Circuits due to differing interpretations of the phrase "based upon."

Relators are in error. There is no clear conflict among the circuit courts of appeals as alleged by relators. Moreover, based upon the facts of this case, relators' action would have been barred in all circuits no matter what interpretation of the phrase "based upon" as used in

section 3730(e)(4) was current in that circuit. Thus, under the facts of this case, the stated conflict is irrelevant. Because this case does not present the issue relators urge this Court to resolve, the petition should be denied.

31 U.S.C. § 3730(e)(4) provides in pertinent part as follows:

> "(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> "(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Accordingly, a *qui tam* action must be dismissed if it is "based upon" publicly disclosed allegations *and* relators are not an "original source" of the allegations.

The conflict relators identify is over the precise interpretation of the phrase "based upon" in subdivision (A) of section 3730(e)(4). Relators argue that the phrase "based upon" must be read to require more than the public disclosure of allegations prior to the filing of a *qui tam* action. Relators further argue that there is a clear conflict among the circuit courts of appeals on this issue.

Relators are in error. There is no such clear conflict, and the underlying action would have been barred in all circuits.

A. There Is No Conflict Among The Circuit Courts Of Appeals Which Warrants Review As To The Interpretation Of The Phrase "Based Upon"

Relators base their argument on the holding of the Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 at 1348 (4th Cir. 1994). In *Siller*, the Fourth Circuit held that the phrase "based upon" should be interpreted as "derived from." The Fourth Circuit specifically criticized the Second Circuit's prior holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992) that public disclosure of an allegation in a *qui tam* action divests district courts of jurisdiction over a *qui tam* suit, regardless of where the relator obtained the allegation. *Siller*, 21 F.3d, at 1348. Relators argue that *Siller* has been followed by other circuits in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995), *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990) and *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir. 1993), *cert. denied*, 508 U.S. 973 (1993).

Relators argue that these cases use a three-step analysis of the jurisdictional bar provided for by 31 U.S.C. § 3730(e)(4) as contrasted with a two-step, automatic presumption approach to the jurisdictional bar used in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318

(2nd Cir. 1992) and the underlying action, *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996). Relators argue that under an automatic presumption approach the only relevant fact is whether the allegations upon which the *qui tam* action is based were publicly disclosed prior to the filing of the *qui tam* action. They further argue that the automatic presumption approach has been followed by the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993).

However, an examination of the cases relied on by relators demonstrates that *Siller* does not have the progeny ascribed to it by relators.

Contrary to relators' argument, the Eleventh Circuit in *Cooper v. Blue Cross and Blue Shield of Florida, supra*, did not follow *Siller*. Instead, the Eleventh Circuit followed the reasoning of the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Industries*, a case which relators claim is in conflict with *Siller*. Indeed, an examination of *Cooper* reveals that the reasoning of the Eleventh Circuit follows that of the Second Circuit in *Doe v. John Doe* and is similar to that of the Ninth Circuit in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992). In *Cooper*, the dispositive fact in determining whether the *qui tam* action was "based upon" publicly disclosed allegations was that *Cooper* filed his *qui tam* action some five weeks after the public disclosure. *Cooper*, 19 F.3d at 567-568.

Similarly, the Fifth Circuit in *Federal Recovery Services, Inc. v. United States*, relied on the fact that the *qui tam* action was filed more than a year after the public disclosure of the relevant allegations in other litigation and

cited the Ninth Circuit's opinion in *Wang v. FMC Corp.*, as authority for the holding that the *qui tam* action was "based upon" public disclosures. *Federal Recovery Services, Inc.* at 451. Again, in *Wang*, the *qui tam* action was held to be "based upon" public disclosures because the disclosures preceded the filing of the *qui tam* action. Thus, *Federal Recovery Services* does not truly follow *Siller*.

The Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.* (alleged by relators to be part of the progeny in *Siller*) cited with approval the Tenth Circuit's holding in *Precision* that the statutory bar of section 3730(e)(4) applies to "a '*qui tam* action- . . . based in any part upon publicly disclosed allegations or transactions.' " *Kreindler*, 985 F.2d at 1158. Furthermore, the Second Circuit in *Kreindler* cited with approval its holding in *Doe v. John Doe* so roundly criticized by the Fourth Circuit in *Siller*. " 'Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information.' " *Kreindler*, 985 F.2d at 1158. Thus, the Second Circuit's reasoning is more akin to what relators describe as the automatic presumption approach than it is to what relators characterize as the three-step approach of *Siller*.

Again, relators attempt to show a conflict among the circuits by arguing that the opinion of the Second Circuit in *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990) is part of the progeny of *Siller*. Yet the reasoning behind the Second Circuit's opinion in *Dick* is much more similar to the reasoning of that same circuit in *Doe v. John Doe Corp.*, decided two years later, than it is to the reasoning of the Fourth Circuit in *Siller*. According to the Second Circuit in *Dick*, " . . . for the reasons stated

hereinabove, we believe that if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred." *Dick*, 912 F.2d at 18. Again, the relevant factor is timing of the disclosure vis-a-vis the filing of the *qui tam* action.

Thus, contrary to relators' arguments, the reports of *Siller's* progeny have been much exaggerated. *Siller* does not have the progeny ascribed to it by relators. There is no conflict among the circuits which warrants review by this Court.

B. Relators' Action Would Be Barred In All Circuits

Relators argue that review by this Court is necessary because their action, although barred under Ninth Circuit precedent, would not have been barred in other circuits. Relators are in error. A review of the facts in this matter demonstrates that no matter how the phrase "based upon" is used, relators here would have been barred from bringing this action.

As stated above, the Fourth Circuit in *Siller* has interpreted "based upon" as "derived from." *Siller*, at 1348. Other circuit courts of appeals have used differing words to interpret "based upon," but the general consensus among all other circuits is to preclude suits based in *any part* on publicly disclosed information. *Cooper*, 19 F.3d at 567; *Kreindler*, 985 F.2d at 1158; *Federal Recovery Services, Inc.*, 72 F.3d at 451. Here, no matter whether "based upon" is viewed from the *Siller* perspective, or from the

general perspective, the underlying action would be barred.

This is because relators' *qui tam* action is based upon or derived from disclosures of a non-relator, Cotey, including disclosures by Cotey to the media. Here, it is undisputed that relators obtained their knowledge of the information underlying the allegations from Cotey. *Cotey then, in the presence of the relators, disclosed the allegations to the media.*[5] Only subsequently did relators use these same allegations in their *qui tam* action. Cotey (the person who gave relators the information behind the allegations in their complaint) disclosed these allegations to the media, albeit in the presence of relators, prior to the filing of the *qui tam* action. The allegations of the *qui tam* action are thus derived from publicly disclosed information.

The only way to harmonize relators' reading of the statutory jurisdictional bar of section 3730(e)(4) with the actual wording of that statute would be to insert the word "solely" before the words "based upon." The circuits that have considered this tortured reading of the statute have declined to read the word "solely" into the statute, as to do so would alter the statute's plain meaning. Indeed, three of the cases cited by relators as being *Siller's* progeny explicitly declined to read the word "solely" into section 3730(e)(4): *Cooper*, 19 F.3d at 567, *Federal Recovery Services*, 72 F.3d at 451, and *Kreindler*, 985 F.2d at 1158.

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[5] This fact is glossed over in relators' Statement of the Case.

Therefore, even under the most liberal interpretation of *Siller*, the facts of the underlying action raise the jurisdictional bar of section 3730(e)(4).[6] That being the case, the underlying action does not present the issue relators seek to raise before this Court. Even if there is a conflict among the circuit courts of appeal sufficient to warrant review by this Court, this action does not present that issue. This Court will not decide an issue unless there is a live case or controversy before it. *Kremens v. Bartley*, 431 U.S. 119, 128-129 (1977). On this ground alone, the petition for writ of certiorari should be denied.

C. The Ninth Circuit's "Cursory" Analysis Of The Issue Relators Seek To Raise Stems From Relators' Concession Of This Issue Below

Relators rely on what they characterize as a "cursory" analysis of the phrase "based upon" by the Ninth Circuit. However, a major reason for that cursory review is that the issue relators seek to address was not raised before the Ninth Circuit. A review of relators' briefs before the Ninth Circuit discloses that they did not address this issue, thus waiving it.[7]

The only issue relators briefed on appeal was whether they were an "original source" as that phrase is used in section 3730(e)(4). Relators did not challenge the

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[6] And, as shown below, there is no basis for any circuit court of appeals to hold that relators were the original source of the allegations in the *qui tam* action.

[7] The relators' briefs before the Ninth Circuit are reprinted at App. 20 and App. 40 of the Appendix to this Joint Brief.

finding of the district court that their *qui tam* action was "based upon" publicly disclosed allegations. Therefore, there was no necessity for more than a cursory review of this issue by the Ninth Circuit.

II.

CONGRESS INTENDED TO EXCLUDE PERSONS SUCH AS RELATORS WHEN IT REQUIRED THAT AN "ORIGINAL SOURCE" BE AN INDIVIDUAL WITH DIRECT AND INDEPENDENT KNOWLEDGE

Relators argue that this Court should grant their petition in order to review whether or not relators who merely republish an allegation that already has been publicly disclosed should be rewarded by the False Claims Act. Persons such as relators have never been rewarded by the False Claims Act, nor should they be.

31 U.S.C. § 3730(e)(4)(B) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

In *Wang*, 975 F.2d at 1419, the Ninth Circuit described who qualifies as an "original source."

> "The paradigm *qui tam* plaintiff is the 'whistleblowing insider.' *Stinson*, 944 F.2d at 1160. *Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot.

> "It is important to note that under the rule we adopt today, *all* those who 'directly or indirectly' disclose an allegation might qualify as its original source. *Dick*, 912 F.2d at 18. Anyone who helped to report the allegation to either the government or the media would have 'indirectly' helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had 'direct and independent knowledge' of the fraud. He is no 'whistleblower.' A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics." (Emphasis in original.)

In *Wang*, the relator had "direct and independent knowledge" because he was a mechanical engineer who worked on the problem and "saw [it] with his own eyes." *Wang*, 975 F.2d at 1417. His knowledge was "direct and independent" because "it was unmediated by anything but [his] own labor." *Id.*

The Third Circuit has defined "direct" as used in this context as "marked by absence of an intervening agency, instrumentality, or influence: immediate." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991), quoting *Webster's Third New International Dictionary* 640 (1976).

In this action, William Cotey is the "original source" of the information on which the allegations are based. The record establishes that it was Cotey, a former employee of Mariposa County CPS, who first reported the information on which this action is based to the

relators and to the media. The record also establishes that sometime after the initial discussion among William Cotey, Deborah Cotey, William Devlin, and the *Mariposa Gazette* reporter, and prior to the publication of the newspaper article, the *Gazette* reporter contacted William Cotey again and had a conversation with him during which he provided the reporter with further details regarding the alleged fraud. Thus, as the "whistleblowing insider" Cotey is "the paradigm *qui tam* plaintiff." *Wang*, 975 F.2d 1419, citing *Stinson*, 944 F.2d at 1160.

As the Second Circuit stated in *Stinson*, 944 F.2d at 1154:

> "One theme recurring through the legislative history [of the 1986 amendment] is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the 'conspiracy of silence' among employees of corporations engaging in fraud. *See* S.Rep. No. 345, 99th Cong. 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5271. The Senate Report stresses that in order to detect fraud it was necessary to enlist the 'cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.' *Id.* at 4, U.S. Code Cong. & Admin. News 5269."

Relators are not persons with "first-hand knowledge of fraudulent misconduct"; they are not "individuals who are either close observers or otherwise involved in the fraudulent activity." *Stinson*, 944 F.2d at 1154. Relators do not have any personal knowledge of the alleged fraud; they saw no fraud with their own eyes. *Wang*, 975 F.2d at 1417. Their knowledge is not unmediated by anything but

their own labor. *Id.* Relators' obtained all of their information concerning the alleged fraud *indirectly*, since it was provided to them by Cotey, who is an "intervening agency, instrumentality, or influence." *Stinson*, 944 F.2d at 1160. Relators' knowledge is therefore *dependent* on Cotey. Thus, relators' knowledge of the information on which the allegations are based is not "direct and independent." 31 U.S.C. § 3730(e)(4)(B).

Relators argue that since they possessed the information upon which the action is based in advance of the media disclosure, and since they played a part in disclosing the allegations, they should be rewarded. The fact that relators may have possessed the information upon which the action is based in advance of the media disclosure does not, however, mean that they have "direct and independent" knowledge as required by section 3730(e)(4)(B). As discussed above, relators obtained all of their information concerning the alleged fraud *indirectly* from Cotey; their knowledge is *dependent* on Cotey. They do not have first-hand knowledge of the alleged fraud, and they are not either close observers or otherwise involved in the alleged fraudulent activity. *Stinson*, 944 F.2d at 1154. They saw no fraud with their own eyes. *Wang*, 975 F.2d at 1417. Thus, notwithstanding the fact that relators may have possessed the information upon which the action is based in advance of the media disclosure, relators do not have "direct and independent" knowledge and, therefore, do not qualify as an "original source" under 31 U.S.C. § 3730(e)(4). As stated in *Stinson*, 944 F.2d at 1161:

> "This is in accord with the relevant caselaw. In *United States v. Rockwell Int'l Corp.*, 730 F.Supp.

> 1031, 1036 (D.Col. 1990), the court dismissed a *qui tam* action brought by the Taxpayers Against Fraud, a nonprofit corporation, which learned about the alleged fraud from a whistleblowing insider, because the corporation had no direct and independent knowledge of the information."

Relators argue that fraudulent activity in government offices such as county Child Protective Services will not come to light because of confidentiality statutes unless the "original source" requirement is read more broadly. However, relators' argument is belied by the facts of this case. Here, claims of fraud in the Mariposa County Child Protective Services agency were disclosed publicly by Cotey. Thus, it is clear that confidentiality statutes do not prevent allegations of fraudulent activity from being disseminated.

Thus, the petition for writ of certiorari should be denied. A broader reading of the original source requirement is not warranted as allegations of fraudulent activity were disseminated by the paradigm insider and potential *qui tam* plaintiff. Relators here contributed nothing significant to exposure of the alleged fraud and merely went along for the ride. Such persons were never meant to be rewarded by the False Claims Act.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Relators have unsuccessfully attempted to manufacture a conflict among the circuits which warrants review by this Court. Relators have not shown that the Fourth Circuit's

criticism of the Second Circuit's approach to the interpretation of the phrase "based upon" in section 3730(e)(4) has been followed by other circuits. Although relators allege that the Ninth Circuit only cursorily reviewed the meaning of the phrase "based upon," this is because relators failed to raise this issue before the Ninth Circuit.

Moreover, because relators based their allegations in the *qui tam* action on allegations previously publicly disclosed by the person with direct and independent knowledge of the information on which those allegations are based, even the Fourth Circuit would have dismissed relators' action. Therefore, the facts here do not present the issue relators seek to raise before this Court. For this reason alone, the petition should be denied.

The *qui tam* action was properly dismissed because it was based upon allegations previously publicly disclosed and relators are not the original source of those allegations in that they have no direct and independent knowledge of the information on which those allegations are based. Because the one person with that direct and

independent knowledge is not a relator, the petition should be denied.

Dated: September 26, 1996.

Respectfully submitted,

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Weekly
Mariposa Gazette
[LOGO]

Thursday, February 6, 1992

Grand Jury asked to probe
Child Protective Services

By Jerry Rankin

A Mariposan locked in a bitter child custody struggle is asking the FBI and grand juries here and in Madera to investigate the operations of the local government agency which protects children.

And on Monday, he also filed claims for $25 million each with the board of supervisors in Mariposa and Madera Counties for allegedly mishandling his case.

The supervisors normally deny such claims, which then legally frees the complainant to file a lawsuit in civil court.

The FBI confirms it is looking at the Mariposa County situation – not as a criminal matter but as possibly requiring review by the federal agency which funds such services.

Tom Archer, head of the Mariposa County Child Protective Services, says he is surprised and hurt at the request for an investigation of his unit. He believes it provides better and more thorough examination of cases involving child welfare than any other county in the state.

Ironically, it is a former employee of his, Bill Cotey, who is asking for the investigations – and Cotey praises the local CPS operation.

"The Mariposa CPS unit is the best in the state." he told the *Mariposa Gazette*. "I do have an axe to grind against the system, but not against Mariposa CPS."

Yet, in a complaint mailed to the Mariposa Grand Jury last week, he declares: "Child Protective Services is an agency out of control and operating well beyond the scope and intent of the legislature. . . . Having formerly been employed by the Mariposa (County) Department of Social Services, I feel that there is widespread abuse of power and authority by officers of Child Protective Services upon children and parents alike that destroys the unity of families and jeopardizes the health and safety of innocent children."

Still, Cotey says he would prefer his family's personal custody case were being handled in this county, instead of Madera, and stresses that his concern is for the CPS system statewide. He isn't alone.

Grand Jury investigations into CPS operations are under way in Merced and San Diego Counties, and critics of the system are pressing for other counties to follow.

In those counties, parents have accused the system of illegally taking their children, charging the parents with a crime and then dropping the charges.

Hundreds of people asked for the San Diego investigation, and a report is due this month. In Merced County this week, a couple whose children were taken from them filed a $37.5 million claim against the county. Criminal charges had been filed against George and Linda Forsyth, but then dropped.

Charles Davenport, foreman of the Mariposa County Grand Jury told the *Gazette* he hasn't seen Cotey's complaint yet. However, he said, "we take a look at all complaints." It will be turned over to the appropriate committee and "if it's deemed within our jurisdiction, we'll proceed on it."

Cotey and critics of Merced CPS are preparing to file civil lawsuits once the Grand Jury involvement is over. Such suits have been difficult to win in the past.

State law specifically exempts professionals such as doctors who report possible child abuse from being sued for damages. And it also grants immunity to the social workers who operate the system.

However, a recent U.S. Supreme Court ruling dealing with suits against the government has given the critics renewed hope that they can prevail in court.

One element of Cotey's complaint to the Mariposa Grand Jury pertains to record-keeping of cases involving assistance to the homeless and the protective services to adults and children.

Central to his complaint is a meeting Cotey attended with Archer and four fellow workers sometime in the past three years.

Recollections of the meeting are dramatically different.

Cotey, in his letter to the Grand Jury, recalls that Archer – then head of the unit, now head of the Human Services Department – told them "our CPS statistics were too low and that we needed to use everything we could to inflate these statistics to increase our funding. Mr.

Archer stated that his wife, Melody Archer, had shown him how to do some 'creative things' with the statistics." (Melody Archer runs Child Protective Services in Merced County.)

In an interview, Archer declared there is "absolutely no validity to that; I would never falsify or contrive a report of falsified figures." He recalls such a meeting but says Cotey is simply wrong in the message he feels he received.

Archer says when he took over the unit in March 1988, the staff "weren't doing their paperwork. . . . Our statistical reporting was an abomination. An awful lot of work being done here wasn't being counted."

He said he ordered that changed, both as a standard administrative procedure and to make sure that the county got all the money coming to it for areas where caseload influences funding. And he said he did mention his wife, because her office handles thousands of cases a year and she is expert in the field.

Archer provided statistics which show the CPS workload has, indeed increased. In 1987, the office reported 226 cases for the year; it was 215 in 1988. But for 1989, under his philosophy that "no work is done until the paperwork is complete," the cases soared 72% from the previous year to 370.

However, they fell to 367 in 1990 and dropped to 260 in 1991.

He says a group of factors in 1988 and 1989 boosted the caseload. For example, the state tightened its reporting rules even as he also applied the screws.

The local staff developed new programs to work more closely with those who might spot possible abuse. In one program in the 1988-89 school year, 1,158 children and school personnel were reached by a child assault prevention program. That was followed by a jump in referrals the first half of 1989.

And, the department reorganized, which allowed specialization in child protective matters. Archer comments: "Stress and frustration levels are unusually high in the children's services delivery system because our mission is so critical, the children and families in crisis so vulnerable and the variables and judgments required so unlimited."

During the interview, Archer called in Dianne Austin Bondshu of the CPS operation, who also had been at the meeting Cotey cited.

She told the *Gazette* her memory of the meeting is similar to Archer's.

"We were probably lax on statistics," she recalled, and said Archer was adamant that the record-keeping be complete and accurate.

But, she added, "We have never created a statistic – it would be too much work, for one thing."

Archer echoed her, and wondered what the value of double-counting of cases would be.

Only the CPS cases, he said, are caseload-funded by the state, which is relaying federal dollars.

Inflating or creating false files would be a tremendous drag on a small staff and the payoff wouldn't be worth it, he said.

He also said that his salary and that of his staff is not affected by caseload, so they couldn't benefit personally from fiddling with the files.

Marilyn Lewis, a program manager with the State Department of Social Services which oversees CPS, told the *Gazette* it is possible and accepted for a case in one category to also be counted in another.

However, she said, it would be "clearly inappropriate" to deliberately inflate caseloads. "I've not heard of it happening."

If it did, she said, "it probably would call for personnel action on the part of the county."

Cotey says he kept track in his personal records of instances in which, for example, a case involving aid for a homeless man might also be counted as a CPS case, starting in early 1989.

He sent his information to the FBI in Fresno.

There, Special Agent Jim Hyndman confirmed receipt of the complaint.

Asked if it was being treated as a criminal matter, he replied "not that I'm aware of."

He said it appears to be a situation where the agency providing the funding should do an audit and determine "what kind of controls need to be implemented." It should be "handled administratively," he said.

But the major thrust of Cotey's complaint to the Grand Jury is on CPS in general in California, and his own bizarre case in particular.

Cotey, a former police officer and deputy sheriff in Wisconsin, admits to an enormous amount of frustration.

He joined the social services department in 1987. His duties included helping the homeless and victims of domestic violence, liaison with the community groups that refer people to the department and occasional CPS cases.

In a job performance review, Archer had said Cotey "continues to do an excellent job. . . . His participation is always professional and his analysis and comments always contribute to developing a sound service plan. Bill's job skills, judgment and loyalty remain uniformly excellent and his maturity and dependability are a major asset in a highly stressful program."

But, when he resigned last Dec. 19 after being on sick leave since August, Cotey cited his case and rapped the system in his letter to Archer: "I'm very bitter about this. I do not feel that I can be objective in dealing with these cases any longer. . . . I am very disappointed that my own department and the people I have worked with for years have been unable to have anything to do with the CPS investigation in our case."

While he can't legally comment on Cotey's specific case, Archer says it would be a clear conflict of interest for his department to investigate a case involving an employee. Cotey responds that since he no longer is an employee, that obstacle has been removed.

Cotey was married last summer to Debra Dexter, mother of a 2-year-old son and 4-year-old son. Their father lives in Ahwahnee, Madera County.

Debra already had been involved in a struggle with the father over custody of the children for several months.

In February, Madera County Superior Court Judge John De Groot granted joint custody, with the father getting primary custody and Debra allowed regular visitation.

But soon, she sought to have the children live with her in Mariposa County. She said she had signed an agreement giving the father primary custody because he said that was the only way she would get to see them.

Lynn Bundy, a conciliation specialist, did a report for the court critical of both parents to some degree.

But the report said Debra "fits a rather classic profile of an abused spouse."

The report described the father as "an intensely angry, self-absorbed and immature individual. . . . His overall credibility is rather poor. . . . "

In April, the court awarded physical custody of the boys to Debra.

And in September, Judge De Groot formally confirmed that, allowing joint custody but this time with Debra holding primary custody and the father given visitation.

The judge pointed out that Debra admitted past drug and alcohol problems, but noted she was in counseling.

Debra is an Indian, and workers from Indian welfare agencies in two counties described her as a caring and competent mother. "The children are properly cared for and . . . their health needs are being met," the judge wrote.

He also said that the father had a drug abuse background. And the father's "testimony demonstrated an inappropriate hostility to these proceedings and confirmed (the conciliator's) assessment of him as an immature individual," the judge said.

He added:

"The children are now in a stable family environment and receiving appropriate care. It is in the best interests of the children that the continuity of this favorable environment be maintained at this time."

The Coteys thought that would settle it.

During the year, they had reported to the Mariposa sheriff's office that they had received threatening phone calls. And before 1991 was over, the propane tank at their home was vandalized, and Cotey's car caught fire while Debra was driving to Ahwahnee with one of her other children.

In August, Mariposa County Superior Court Judge Richard McMeehan issued a restraining order against the boys' father, ordering him from harassing Debra or her family, and to stay at least 100 yards away from the Coteys. Cotey reported to the sheriff's office that the father later violated the latter condition.

Then came Thanksgiving.

The two boys were visiting the father in Madera County when the father reported to its sheriff's office that the 4-year-old accused Bill Cotey of sexually molesting him.

Madera County's Child Protective Services office immediately ordered the children to remain with the father and not return to Debra.

In early December, Madera County CPS worker Kathy Marklund, in a report to the Juvenile Court there, said she found the 4-year-old's statements to be "consistent and believable."

The court agreed and ordered that the father should continue to have the children.

Cotey finds this decision puzzling.

He points out that he immediately offered to leave the household until the issue was resolved.

He notes that one of the Madera CPS workers in his case is Lorie Snider, whom he had complained about to authorities there when he referred cases from Mariposa County.

Cotey says that when Snider came to Mariposa County to investigate his case, she basically refused to talk to him.

He says she also refused to look at the court documents in which the conciliator and judge criticized the man accusing Cotey.

Sandy Scott, the new head of CPS in Madera County, wouldn't respond to questions about Cotey's case, citing

state law protecting the privacy of those in the CPS system.

However, she said that in general terms a potential conflict of interest on a caseworker's part "sounds like something that should be looked into."

She added that "complaints are taken seriously, not just thrown in the waste basket."

But the most important factor in his defense, Cotey says, is that Mariposa County Sheriff's Deputy Brian Muller investigated the molestation complaints, talked twice to the child and didn't file charges.

In his report, Muller states that in his presence the alleged victim did discuss the accusation with his mother, Debra.

In this conversation, according to the report, the boy said his father made him accuse Cotey. The boy said "no" when asked if Cotey had molested him, the report states.

And in this conversation the boy accused the father of molesting him and said he didn't want to stay with him. Muller faxed that report to Madera authorities.

Finally, Cotey points out that he was given a lie detector test at his insistence on Dec. 30.

Cotey was asked if he had been involved in any sexual acts with the boy, and if he had done the specific acts the boy alleged. He answered "no" to each question.

The report from State Justice Department polygraph examiner Robert Liburdy states: "It is the opinion of this examiner that Cotey was truthful in his answers to the relevant questions."

This isn't the only accusation of sexual molestation against Cotey. He freely admits that an older daughter in Madera County once accused him of molestation. He said she was drunk and later recanted the accusation to the sheriff's office there; she was returned to his home.

Why, Cotey wonders, are the two boys still allowed to be kept by their father when the father also has been accused of molestation, including in a letter written just last month by a daughter of Debra's, and when Cotey has been cleared by the sheriff's office here and passed the lie detector test?

Madera County, he wrote to the Mariposa County Jury, is "placing (the boys) into the very environment from which they should be protected." He suggests they at least should be placed in a foster home, the safe refuge normally used by a court when there is question about a child's welfare in its own family.

(The boys' father and his attorney could not be reached for comment on the case.)

That and his other complaints about the Madera operation are contained in Cotey's request for the Grand Jury investigation there.

"How they could get all that information and not do anything doesn't make sense," he says.

He notes that other children also have been affected by the case.

For example, he has voluntarily stopped seeing his own son, who lives in the area, until the matter is resolved.

And Debra's 10-year-old daughter – who also lived with the Coteys – has been sent to live with a relative, under pressure from the Madera County social workers.

Making the case even more unusual and complicated is the fact that the two boys are enrolled Chukchansi Indians. Under federal law, this gives them special protection.

The Coteys are seeking to have Bureau of Indian Affairs lawyers take over the case and move it to federal court, contending the CPS caseworkers already have broken the law by ignoring the rights of the boys under federal law.

A federal lawyer is to arrive this week to consider the case.

Meanwhile, both sides were back in Juvenile Court in Madera on Monday.

Cotey said the attorney appointed by the court to look after the interests of the children had been provided no documents relating to the case.

He furnished a set and the attorney, Linda Thompson, sought to remove the children to a foster home for the 30 days it will take her to investigate the case from all aspects.

However, Superior Court Judge Edward Moffatt left the children temporarily with the father, but agreed to hear motions in 30 days to take them away from the father and to transfer jurisdiction to federal court in Fresno.

Debra told the *Gazette* that if nothing else, the case should demonstrate to the public that there are routes outside CPS available when parents feel aggrieved by how they are treated by the system.

She declared: "I'm in the right and they're in the wrong."

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Relators, in pro per

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, et al., Plaintiffs vs. TOM ARCHER, et al Defendants	CIVIL ACTION NO. CV-F-92-5086-REC **DECLARATION OF WILLIAM DEVLIN**

I, the undersigned, declare:

1. I am one of the relators in the above captioned action.

2. In November of 1992, I was working for Rod Kodman in preparing documents for the submission of a claim for damages to Merced County. As a result of his filing such a claim and ensuing publicity in the Merced Sun Star, Mr. Kodman informed me that he was contacted by William Cotey, a former employee of Mariposa Child Protective Services who told Mr. Kodman that he had

information on fraud committed by employees of Mariposa County. This contact was made sometime prior to January 20, 1992.

3. During the week of January 13, 1992, I met and interviewed Mr. Cotey and thoroughly interrogated him regarding the fraud. It is at this time that the Relators received the information which formed the basis for this false claims action. Some time after this interview, I prepared petitions to the grand juries in Mariposa and Madera Counties for Mr. Cotey. These petitions requested an investigation of Child Protective Services.

4. The week before the February 6, 1993 article appeared in the Mariposa Gazette, Mr. William Cotey, his wife Deborah Cotey and I went to the Mariposa Gazette and gave a reporter, Jerry Rankin the information that was contained in the article of February 6, 1993. Mr. Rankin was the author of that article. At the time we talked to Mr. Rankin of the Mariposa Gazette, he had no knowledge of the fraud and our contact with him was the first time he learned that any fraud was taking place.

5. After the newspaper published their article based on the information we had supplied them, the Relators made the decision that due to the publicity about the fraud in the Gazette we should file our suit immediately and did in fact file it on February 11, 1993.

6. Some time after giving the information to Mr. Rankin of the Mariposa Gazette, I personally contacted some of the persons whose files were the subject of the fraud. I had been given the names of these persons shortly prior to my going to the Gazette and talking to Mr. Rankin. Several of these persons advised me that the

services allegedly rendered them and which we believed the United States was billed for had never been rendered.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This 21st day of March, 1993

/s/ William Devlin
William Devlin

EXHIBIT "C"

DECLARATION OF JERRY RANKIN

Jerry Rankin declares as follows:

1. I am a reporter for the Mariposa Gazette and was employed in this capacity on or about January 13, 1992.

2. On or about January 13, 1992, I was in the office of the newspaper during the evening William Devlin, Deborah Cotey and William Cotey used the newspaper's copier to photocopy some documents.

3. During the course of their copying those documents, I discussed with them the problems that William Cotey was having with Child Protective Services of Madera County. During the course of that conversation, I learned that the documents they were copying contained records of alleged fraud by Mariposa County whereby the county and its employees allegedly falsified records to increase their Federal funding. At this time, I discussed this alleged fraud with Mr. Cotey, Deborah Cotey and William Devlin.

4. Sometime after this conversation, I contacted William Cotey again and had a conversation with him during which he gave me further details regarding this alleged fraud.

5. On February 6, 1992, the Mariposa Gazette published an article written by me describing this alleged fraud and a petition to the grand jury presented by Mr. Cotey. This article began with the headline "Grand Jury asked to probe Child Protective Services".

I declared under penalty of perjury that the foregoing is true.

/s/ Jerry Rankin	6-25-93
Jerry Rankin	Date

App. 20

NO. 93-16729

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

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NO. 93-16729

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff, Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the trial court in error in its finding that it lacked subject matter jurisdiction of this cause?

a. Was the trial court in error in its finding that the Relators/Appellants were not the "original source" of

the information on which the news media disclosure was based.

STATEMENT OF JURISDICTION

This action was brought by Relators Devlin, Kodman and Sidicane pursuant to the False Claims Act, 31 U.S.C. §3729. Jurisdiction of the action was conferred on the district court by 28 U.S.C. §1331 (federal question) and 31 U.S.C. §3732(a) (False Claims Act).

A document entitled "ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION" was filed in the district court on July 22, 1993 (CT 67); on July 26, 1993 the court issued its 'ORDER CORRECTING ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION" *Nunc Pro Tunc* (CR 68). That "ORDER" effectively granted judgment to the Defendants and terminated the proceedings. Thereafter on July 29, 1993, Relators filed a motion for Reconsideration (CR 69). A document entitled "ORDER DENYING MOTION FOR RECONSIDERATION" was filed by the court on September 2, 1993 (CR 74). On September 10, 1993, the Appellants William Devlin, Rod Kodman and Stanley Sidicane filed their notice of appeal from the final order terminating the case (CR 75); Rule 57, Federal Rules of Civil Procedure. The Notice of Appeal was timely. Rule 4, Federal Rules of Appellate Procedure.

Jurisdiction of the appeal is conferred upon this court by 28 U.S.C. §1291.

STANDARD OF REVIEW

The district court's Order terminating this litigation is subject to *de novo* review. The district court's ruling on questions of law are review *de novo, Los Angeles Memorial Coliseum Commission v. National Football League,* 791 F.2d 1356, 1360 (9th Cir. 1986).

STATEMENT OF THE CASE

On February 11, 1992, Relators William Devlin, Rod Kodman and Stanley Sidicane filed a *qui tam* action under the False Claims Act against the State of California, several counties of that state and various officials of those counties. A First Amended Complaint was later filed (CR 18).

On October 22, 1992, an order was entered stating that the United States had declined to intervene in this action, unsealing the complaint and relators to pursue the case in the name of the United States.

This First Amended Complaint was served on the Defendants Mariposa County, Tom Archer, a supervisory official of that county's Department of Social Services and the State of California, who answered it on December 9, 1992 (CR 23) and June 10, 1993 (CR 54).

The First Amended Complaint alleged that beginning sometime in 1990, the Social Services Department of Mariposa County, California, at the direction of Defendant Tom Archer, an employee of that county, fraudulently increased its Federal funding by having his employees falsify records of families receiving assistance under various federally funded acts. It alleged further that by

doing so, Mariposa County received Federal funds for investigations and activities which had never been conducted. It also alleged that certain time records had been fraudulently inflated to increase the county's federal funding.

It alleged further that False claims based upon the records of these falsified or inflated cases were then submitted to the State of California which transmitted them to the United States Government for payment. The United States then paid funds to the state and county based upon these false claims.

The First Amended Complaint alleged that Plaintiffs informed the State of California of these false and/or fraudulent claims and said state and its officials failed to take any action to investigate, reclaim and/or repay the monies unlawfully obtained by the other defendants. It was alleged that based upon the presentment of these false claims, monies were fraudulently received by the State of California and Mariposa County. In addition to the fraud committed by Mariposa County and Tom Archer, the State of California and its officials, in failing to investigate and/or take any action to reclaim and/or repay the monies that were fraudulently received also violated the False Claims Act.

On June 11, 1993, Defendants Tom Archer and the County of Mariposa filed a Motion to Dismiss the Complaint (CR 55) and accompanying brief (CR 56), alleging that the court lacked jurisdiction over the subject matter of the action because the allegations upon which the action was based were publicly disclosed in the news media prior to the filing of the complaint. It alleged

further that Plaintiffs/Appellants were not the "original source" of the information.

This Motion claimed that on February 6, 1992, the Mariposa Gazette newspaper published an article detailing the same allegations which were contained in the First Amended Complaint which was filed five days later. The article attached to the brief, stated in pertinent part that Bill Cotey, a former employee of Defendant Archer's filed a complaint with the Mariposa County Grand Jury outlining the fraud which formed the basis of the First Amended Complaint. Attached to the motion was the article which appeared in the Mariposa Gazette (CR 56, exhibit 1), a declaration of the managing editor of the newspaper stating that the article was published in the Gazette on February 6, 1992 (CR 57).

The motion also attached a declaration of relator William Devlin filed in connection with discovery matters in the case, (CR 56, exhibit 2). This declaration stated in essence that prior to January 20, 1992 relator Rod Kodman had been contacted by William Cotey and that Devlin interviewed Cotey regarding the allegations of Fraud during the week of January 13, 1992. It stated further that prior to the publication of the Gazette article, Kodman and Devlin went to that newspaper and gave it the information which formed the basis of the article. Devlin stated that due to the publicity about the fraud in the Gazette article, it was decided to file the suit immediately and it was filed on February 11, 1993. (The record in this case will show that the February 11, 1993 date shown in the Devlin declaration was in error and the action was actually filed on February 11, 1992). This

Motion to Dismiss was joined in by Defendant State of California (CR 59).

Appellants/Relators filed an opposition to the Motion to Dismiss (CR 63) showing that (1) they had information related to the fraud prior to the disclosure in the Mariposa Gazette; (2) that prior to the publication of the article, Relators had both additional information regarding the fraud and documentary evidence explaining how the fraud was committed; and (3) the Relators were the ones that gave the information to the Mariposa Gazette upon which the article was based.

This opposition by the Relators contained the declaration William Devlin (CR 63, exhibit a) which showed that he went to the Mariposa Gazette with William and Deborah Cotey and that the article was based upon the information they gave to Jerry Rankin, the reporter who wrote the article. The Devlin declaration also showed that he was the one that drafted the request for the Mariposa County Grand Jury to investigate the local Child Protective Services agency. Devlin also declared that he made an independent investigation of Cotey's allegations and confirmed by independent witnesses that the fraud did exist.

The opposition also contained the declaration of Relator Rod Kodman (CR 63, exhibit B) declaring that certain information in the Mariposa Gazette article was in error, and that he and not Cotey informed the F.B.I. of the fraud. Kodman outlined numerous contacts he made with government officials attempting to have them take action about the fraud. These contacts contained independent evidence related to the fraud and were all were [sic]

made prior to the publication of the Gazette article. The contacts included letters to several congressmen requesting that they forward the information to the Attorney General of the United States, the United States General Accounting Office and the U.S. Inspector General. Attached to the Kodman declaration were several receipts including one showing that he had the information delivered to F.B.I. agent Hyndman on January 21, 1992 and Congressman Gary Condit on that same date.

Finally, the opposition contained the declaration of Jerry Rankin (CR 63 exhibit C), the Mariposa Gazette reporter who wrote the article verifying that his first information regarding the fraud was obtained from Relator Devlin and William and Deborah Cotey who were in the office of the Gazette copying documentary evidence related to the fraud.

The Defendant State of California filed its reply to the opposition of the Relators (CR 64) and, after oral argument on the motion was heard on July 12, 1993, the court granted Defendants' Motion to Dismiss (CR 66), finding that the court lacked subject matter jurisdiction because there had been public disclosure of the allegations upon which the action was based and that the Relators were not the "original source" of the information. This Order was thereafter corrected by the court (CR 68) *nunc pro tunc*.

On July 29, 1993, Relators filed a Motion for Reconsideration (CR 69) requesting the Court to reconsider its order dismissing the case. In this motion, Relators supplemented their proof that they had separate, independent evidence of the fraud and attached as exhibits, a

letter from William Cotey, outlining how he was one of the perpetrators of the fraud while he worked for Mariposa County, some of the ledger cards kept by Cotey documenting the fraud and ledger sheets used by Cotey to show fraudulent work which [sic] for which the United States was billed. The Motion also contained the declaration of Rod Kodman stating that these documents were in Relator's possession long before the newspaper article in the Mariposa Gazette (CR 69, p.8, 9) and that of Relator Devlin (CR 69, p. 10, 11) stating that he contacted several of the persons named on the cards and verified that the services Cotey claimed were rendered to these individuals had not in fact been performed. These documents were proffered to show that the Relators had direct and independent knowledge of the information upon which the allegations in the newspaper prior to the publication of the article.

Defendants Archer and Mariposa submitted their opposition to this Motion for Reconsideration (CR 72) this opposition was joined in by defendant State of California (CR 73).

On September 2, 1993, the Court entered its Order Denying Motion for Reconsideration (CR 74). This appeal followed.

ARGUMENT

The Relators' position is simply stated. This is a classic case where the district court ignored or misinterpreted this court's ruling in *Wang ex rel. United States v. FMC Corp.*, 975 Fed.2d 1412 (9th Cir. 1992).

Appellants/Relators have conceded that an article in the Mariposa Gazette pre-dated the filing of this action by five days. That article contained a portion of the allegations upon which this False Claims Action was based. Ample proof was presented to the district court that the Gazette article was based upon information given the reporter by the Relators/Appellants who were at the newspaper with one of the perpetrators of the fraud.

Additional proof showed clearly that at the time the information was given the reporter who authored the article, Appellants/Relators had both oral and documentary evidence of the fraud and had verified by an independent investigation that the allegations were true.

Thus Plaintiffs/Appellants played a part in disclosing the allegations and based upon this court's decision in *Wang, supra*. they had direct and independent knowledge of the information upon which the allegations were based. Thus, the district court was in error in dismissing the action.

I. THE DISTRICT COURT HAS JURISDICTION OF THIS CASE SINCE THE APPELLANTS/RELATORS WERE THE ORIGINAL SOURCE OF THE INFORMATION PUBLICLY DISCLOSED IN THE NEWS MEDIA.

31 U.S.C Section 3730(e)(4) provides as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless

> the person bringing the action is an original source of the information.
>
> (B)) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

It is abundantly clear from the declarations filed in this case that the Appellants/Relators qualify as the "original source" of the information since they had direct and independent knowledge of the information upon which the allegations were based and had voluntarily provided the information to various branches of the government including the F.B.I. and members of the United States Congress.

Examination of the proof before the district court in this action shows conclusively that Appellants/Relators possessed the information upon which the action was based in advance of the media disclosure. They had both oral and documentary evidence of the fraud prior to the disclosure. This evidence was in the form of a written statement from William Cotey, one of the perpetrators of the fraud which outlined how he submitted false records to his superiors for payment. Cotey's ledger cards and time sheets also in possession of the Appellants/Relators prior to the media disclosure showed the names of the cases involved in the fraud. Based upon interviews with Cotey and these documents, Relator William Devlin conducted an independent investigation and found the allegations to be substantiated.

The district court's decisions also contain the clear implication that only wrongdoer William Cotey qualified as the "original source" as that term is defined in the False Claims Act. It would appear that the district court concluded that the information given Relators by Cotey did not qualify as "direct and independent knowledge of the information on which the allegations are based" as that term is used in the Act. This implication carries with it the outrageous conclusion that if one is told of a fraud by one of its perpetrators, only that perpetrator can qualify to file the action if there is a disclosure which would otherwise bar the action except for its filing by an "original source."

The court should note that if a wrongdoer is to reduce his liability for filing false claims, pursuant to the provisions of 31 U.S.C. §3729(a)(7) he/she had an obligation to fully cooperate with the investigation and still would still be liable for double damages and costs. By implication, such a wrongdoer could not benefit from his/her acts by filing an action such as this one.

The case of *United States ex rel. Dick v. Long Island Lighting Co.* 912 Fed.2d 13 (2nd Cir. 1990) also supports the proposition that the Relators are the "original source" of the information and thus the action should not have been dismissed. This case was cited with approval by the 9th Circuit Court of Appeals in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

Careful examination of *United States ex rel. Dick v. Long Island Lighting Co., supra.* shows that by the term "original source" congress meant the original source of the public disclosure, not as the court concluded the

original source discovering the fraud against the United States. That case stated in pertinent part as follows:

> Since our fundamental task in interpreting a statute is "to give effect to the intent of Congress," *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed.1345 (1940), we look to the legislative history for evidence of Congress's intent. Two legislators who appear to have been the most involved with the Act's development and passage spoke at length regarding the meaning of "original source." Representative Berman, a co-drafter of the legislation, stated that a person is an "original source", if *inter alia*, the person "had some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed.*" 132 Cong.Rec. H9389 (daily ed Oct. 7, 1980) (emphasis added). Similarly Senator Grassley, who introduced the legislation in the Senate noted that the jurisdictional requirements of §3730(e)(4) barred a person "who had not been an original source to the entity that disclosed the allegations" from bringing a *qui tam* claim based on publicly disclosed information. 132 Cong.Rec. S20535 (daily ed. Aug. 11, 1986) (emphasis added). If §(4)(B) contained the exclusive requirements that a *qui tam* plaintiff must satisfy to be an "original source," these legislators' statements would be somewhat inexplicable. However, their statements made much sense if § (4)(A) contains an additional requirement to be considered an "original source," namely that to be considered an "original source" one must have been a source to the

> entity that first publicly disclosed the information on which a suit is based. Given the foregoing, we are constrained to adopt a reading of the statute in accord with those statements.

In its decision dismissing the action, the court conceded that "There is no question that Devlin, by his participation in the interview with the *Mariposa Gazette* reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." The court also conceded that the Relators had been told by Cotey how he perpetrated the fraud and had documentary evidence provided by Cotey. Thus, the Relators meet the requirements of being an "original source" *United States ex rel. Dick v. Long Island Lighting Co.* 912 Fed.2d 13 (2nd Cir. 1990), *supra.*

CONCLUSION

There can be no question that the Appellants/Relators were responsible for giving reporter Jerry Rankin the information that went into the public disclosure in the Mariposa Gazette. Equally clear is that Appellants/Relators had separate, independent proof of the fraud in the form of discussions with William Cotey and Cotey's documentary evidence and furnished this information to government officials including the F.B.I. and members of the U.S. House of Representatives. Thus, they qualify as the original source of the information as that term is defined in the False Claims Act.

The order of the district court dismissing the action for lack of subject matter jurisdiction should be reversed and remanded to the district court for further proceedings in keeping with such an order.

DATED: December 13, 1993

/s/ William Devlin
William Devlin

/s/ Rod Kodman
Rod Kodman

/s/ Stanley H. Sidicane
Stanley H. Sidicane

PROOF OF SERVICE BY MAIL

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 651 East Hampton Way, Fresno, California 93704.

On December 13, 1993, I served the within OPENING BRIEF OF APPELLANTS on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California addressed as follows:

U.S. COURT OF APPEALS, NINTH CIRCUIT (15 copies)
121 Spear Street, Second Floor
San Francisco, California 94105

U.S. DISTRICT COURT (1 copy)
Eastern District of California
1130 O Street
Fresno, California 93721

Steve W. Dahlem (1 copy)
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U.S. Department of Justice
Civil Litigation Branch
P.O. Box 261 Ben Franklin Station
Washington, D.C. 20044

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 13, 1993.

/s/ Melissa Valgeirsson
Melissa Valgeirsson

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel.
WILLIAM DEVLIN, et al.

Plaintiff/Appellant

vs. CASE NO. 93-16729

STATE OF CALIFORNIA, et al

Defendants/Appellees

STATEMENT OF RELATED CASES

Comes now the Plaintiff and Appellant and submits this statement of related cases as required by Rule 28-2.6.

There are no known related cases pending in this court.

/s/ Stanley H. Sidicane
Stanley H. Sidicane, Relator

PROOF OF SERVICE BY MAIL

STATE OF ALABAMA)
)
COUNTY OF LEE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 740 Lee Road 400, Opelika, AL 36801.

On December 22, 1993 I served the foregoing Statement of Related Cases on the interested parties in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Fresno, California, addressed as follows:

United States Court of Appeals (15 copies)
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Washington, DC 20044

I declare under penalty of perjury that the foregoing is true and correct. Executed December 22, 1993.

/s/ Janet Covington
Janet Covington

NO. 93-16729

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

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NO. 93-16729

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

INTRODUCTION

On February 11, 1992, Relators William Devlin, Rod Kodman and Stanley Sidicane filed a *qui tam* action under the False Claims Act against the State of California, several counties of that state and various officials of those counties.

Thereafter, defendants Tom Archer and the County of Mariposa filed a Motion to Dismiss the complaint claiming that the District Court did not have jurisdiction of the subject matter of the action. They alleged Plaintiffs/Appellants were not the "original source" of the information based upon the fact that prior to the filing of the action, the Mariposa Gazette published an article containing some of the facts contained in this suit. This motion was based upon 31 U.S.C. Section 3730(e)(4) which provides as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

In Appellants/Relators opposition, they showed conclusively that they had possessed information related to the fraud prior to the disclosure in the Mariposa Gazette, that the article was based upon information given the newspaper by Relator Devlin and others and that prior to

the publication of the article they had documentary evidence explaining how the fraud was committed.

I. APPELLANTS/RELATORS DEMONSTRATED CONCLUSIVELY BASED ON UNDISPUTED FACTS THAT THEY WERE THE ORIGINAL SOURCE OF THE INFORMATION ON WHICH THE ACTION WAS BASED.

The case of *United States ex rel. Dick v. Long Island Lighting Co.*, (2nd Cir. 1990) 912 Fed.2d 13 explains the meaning of the term "original source" as congress intended it to be used. The term means the original source of the public disclosure, not the original source discovering the fraud against the United States. Thus the conclusion reached by the District Court was clearly in error. *United States ex rel. Dick v. Long Island Lighting Co., supra.* states in pertinent part as follows:

> Since our fundamental task in interpreting a statute is "to give effect to the intent of Congress," *United States v. American Trucking Ass'ns,* 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940), we look to the legislative history for evidence of Congress's intent. Two legislators who appear to have been the most involved with the Act's development and passage spoke at length regarding the meaning of "original source." Representative Berman, a co-drafter of the legislation, stated that a person is an "original source", *if inter alia,* the person "had some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed.*" 132 Cong.Rec. H9389 (daily ed Oct. 7,

> 1980) (emphasis added). Similarly Senator Grassley, who introduced the legislation in the Senate noted that the jurisdictional requirements of §3730(e)(4) barred a person "who had not been an original source to the entity that disclosed the allegations" from bringing a *qui tam* claim based on publicly disclosed information. 132 Cong.Rec. S20535 (daily ed. Aug. 11, 1986) (emphasis added). If §(4)(B) contained the exclusive requirements that a *qui tam* plaintiff must satisfy to be an "original source," these legislators' statements would be somewhat inexplicable. However, their statements made much sense if §(4)(A) contains an additional requirement to be considered an "original source," namely that to be considered an "original source" one must have been a source to the entity that first publicly disclosed the information on which a suit is based. Given the foregoing, we are constrained to adopt a reading of the statute in accord with those statements.

This case was cited with approval by the 9th Circuit Court of Appeals in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

In its memorandum opinion dismissing the action, the court conceded that "There is no question that [Relator] Devlin, by his participation in the interview with the *Mariposa Gazette* reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." The order of the court also conceded that the relators had been told by Cotey how he perpetrated the fraud and had documentary evidence provided by Cotey.

The declaration of Jerry Rankin, the reporter who wrote the article in the Mariposa Gazette upon which the

Motion to Dismiss was based was included in the opposition to that motion. It clearly showed that Relator Devlin was responsible for giving that reporter the information upon which the article was based. Devlin was at that newspaper with William Cotey (one of the perpetrators of the fraud) and his wife when they discussed the fraud with Rankin. The declaration of Jerry Rankin appears in the Clerk's Transcript 63, Exhibit C and states as follows:

> Jerry Rankin declares as follows:
>
> 1. I am a reporter for the Mariposa Gazette and was employed in this capacity on or about January 13, 1992.
>
> 2. On or about January 13, 1992, I was in the office of the newspaper during the evening William Devlin, Deborah Cotey and William Cotey used the newspaper's copier to photocopy some documents.
>
> 3. During the course of their copying those documents, I discussed with them the problems that William Cotey was having with Child Protective Services of Madera County. During the course of that conversation, I learned that the documents they were copying contained records of alleged fraud by Mariposa County whereby the county and its employees allegedly falsified records to increase their Federal funding. At this time, I discussed this alleged fraud with Mr. Cotey, Deborah Cotey and William Devlin.
>
> 4. Sometime after this conversation, I contacted William Cotey again and had a conversation with him during which he gave me further details regarding this alleged fraud.

> 5. On February 6, 1992, the Mariposa Gazette published an article written by me describing this alleged fraud and a petition to the grand jury presented by Mr. Cotey. This article began with the headline "Grand Jury asked to probe Child Protective Services"

I declared under penalty of perjury that the foregoing is true.

/s/ Jerry Rankin Date 6-25-93.

The opposition by the Relators also contained the declaration of William Devlin (CT 63, exhibit a) which stated that he was the one that drafted the request for the Mariposa County Grand Jury to investigate the local Child Protective Services agency. Devlin also declared that he made an independent investigation of Cotey's allegations and confirmed by independent witnesses that the fraud did exist.

The opposition also contained the declaration of Relator Rod Kodman (CT 63, exhibit B) outlining that he had informed the F.B.I. and various other branches of the government of the fraud prior to the action being filed. These contacts also transmitted independent evidence related to thee [sic] fraud to the various government officials and agencies.

In their Motion for Reconsideration (C.T. 69) Relators appended numerous documents including copies of cards used by William Cotey to document the fraud he had perpetrated on the United States. The declaration of William Devlin included in this Motion showed that he had copies of this documentary evidence prior to the publishing of the Mariposa Gazette article.

It cannot be disputed that the Relators meet the requirements of being an "original source" since they had direct and independent knowledge of the information on which the allegations were based and had voluntarily provided this information to various officials of the Government before filing this action.

As this court stated in approving *United States ex rel. Dick v. Long Island Lighting Co., supra.* "A qui tam plaintiff "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based *Wang, ex rel. United States v. FMC Corporation* (9th Cir. 1992) 975 Fed.2d 1412. It is eminently clear that Relators qualify as the "original source" under this definition.

CONCLUSION

Based on the clear evidence that Relators constitute the "original source" of the information upon which the suit was based as defined by the False Claims Act and case law, this court should reverse the decision of the District Court dismissing the action and allow the action to go forward so that the fraud perpetrated upon the United States may be redressed by an award of appropriate damages.

DATED: February 15, 1994

THE UNITED STATES OF AMERICA

/s/ Illegible
Relator

PROOF OF SERVICE BY MAIL

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 740 Lee Road 400, Opelika, AL 36801.

On February 15, 1994, I served the within REPLY BRIEF OF APPELLANT on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Opelika, Alabama addressed as follows:

U.S. COURT OF APPEALS, NINTH CIRCUIT
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Washington, DC 20044

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 15, 1994.

/s/ Janet Covington
Janet Covington

(3)

Supreme Court, U.S.
FILED
OCT 7 1996
CLERK

Docket No. 96-312

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
ex rel. WILLIAM DEVLIN,
ROD KODMAN,

Petitioners,

v.

STATE OF CALIFORNIA;
COUNTY OF MARIPOSA;
and TOM ARCHER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a non-opportunistic *qui tam* relator must qualify as an "original source" under subsection "B" of 31 U.S.C. §3730 (e)(4) to overcome the jurisdictional bar of that statute without a prior determination that the relator's action is barred because it is "based upon" publicly disclosed "allegations or transactions" as found in subsection "A" of that statute where the relator is the first person to disclose the allegations, transactions, and facts underlying his eventual suit to both the government and the media prior to filing suit and where the relator did not derive any allegation or information of fraud, in any part, from any publicly disclosed allegation, transaction or information.

II. Whether in the confidential arena of federal welfare funding claims by state and county governments, a non-opportunistic *qui tam* relator who learns of systematic county and state government welfare funding fraud through both verbal information and through examining documents from the same county social worker who willfully perpetrated the fraud on the Federal treasury has "direct" knowledge of the information on which his allegations are based so as to be an "original source" under the *qui tam* provisions of 31 U.S.C. §3730 (e)(4)(B) thus entitling the relator to relief from the jurisdictional bar of the statute where the relator also has "independent" knowledge of the information on which the allegations are based and where upon discovery, the relator is the first to report the past and continuing fraud to the government while not deriving any allegation of fraud, in any part, from any publicly disclosed allegation, transaction, or information prior to filing suit.

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REPLY TO OPPOSITION

I.

THE RELATORS' PETITION SHOULD BE GRANTED BECAUSE THE OPPOSITION USES STRUCTURALLY FALLACIOUS ARGUMENTS AND MISSTATEMENT OF THE RECORD TO SIMPLY RECAST THE QUESTIONS WHILE FAILING TO EXPLAIN WHY THE IMPORTANT ISSUES AND CONFLICTS AMONG THE CIRCUITS RAISED IN PETITIONERS' BRIEF DO NOT WARRANT REVIEW

A. The Opposition Fails To Address The Issues Raised In The Relators' Petition But, Instead, Illegitimately Recasts The Issues And Questions Presented.

The first of many efforts to recast the issues presented for this court's review is found at page "i" of the "JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI" (herein known as "Opposition"). Instead of addressing the questions presented by the relators, the Opposition has unilaterally recast the questions and, apparently, written the Opposition brief to oppose a question of its own making. The question presented by the Opposition is inadequate and does not reflect the unique facts of this case.

For instance, despite what the Opposition states in their proposed question presented, the relators believe they have direct and independent knowledge of the information on which the allegations are based." In fact, the lower court even specifically concluded that the relators possessed "independent knowledge". *United States ex rel. Devlin v. State of California,* 84 F.3d 358, 363 fn. 5 (9th Cir. 1996).

Furthermore, the Opposition question fails to raise the issue of Mr. Cotey's identity as a perpetrator of the fraud as well as the fact that the "allegations and transactions" of the fraud were known by the relators months before any story appeared in the newspaper or disclosed by anyone to any Mariposa Gazette

writer as noted in the declaration of Rod Kodman. App. B 1 The Opposition version of the facts and question may lead this court to believe that the relators learned of the fraud at the same time as the media. This is not so. The "allegations and transactions" were known to the relators in December of 1991.

B. The Opposition Illegitimately Presents Unsupported Assertions, Employs Fallacious "Strawman" Arguments, "Begs The Question", and Misinterprets The Cases In Arguing That No Conflict Exists Among The Circuits.

The Opposition argues that "the conflict relators identify is over the precise interpretation of the phrase "based upon" in subdivision (A) of section 3730(e)(4)." Opposition 6 Actually, the relators argue that two types of conflicts among the circuits exist regarding "based upon" analysis. The first is the two-step versus three-step construction of the statute. The second is interpreting the words "based upon".

As noted in the relators' petition, some circuit courts use a two-step and others a three-step construction of §3730(e)(4). This entire conflict among the circuits is addressed nowhere in the Opposition brief; it is simply ignored.

On the one hand, Courts such as the 4th Circuit in *United States ex. rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994) and the 11th Circuit in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) recognize a three-step construction of §3730(e)(4). Courts such as *Cooper* recognize that a "**. . . three part inquiry** determines if jurisdiction exists"; the second part states that if the allegations are publicly disclosed the inquiry shifts to whether the disclosure forms the "**the basis** of the plaintiff's suit; . . ." [emphasis added] *Cooper* , 565, n.4. *See also Williams*, 931 F.2d at 1500, n.12 and the 5th Circuit Court in *Federal Recovery Services, Inc., v. U.S.*, 72 F.3d 447 (5th Cir. 1995).

On the other hand, courts such as the D.C. Circuit in United *States ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645 (D.C. Cir. 1994), embrace a two-step approach which presumes that once allegations are publicly disclosed, any subsequent action is barred unless one qualifies as an original source. In describing the test, the *Springfield* Court stated that "[t]he 1986 *qui tam* amendments set up a **two part test** for determining jurisdiction." [emphasis added] *Springfield,* 651 *See also*, the 9th Circuit Court in the instant case as well as the 10th Circuit Court in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied,* 113 S. Ct. 1364 (1993) and the 2nd circuit in *United States ex rel. Doe v. John Doe Corp.,* 960 F.2d 318 (2d Cir. 1992)

The 2nd Circuit Courts in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.,* 985 F.2d 1148 (2d Cir.), *cert. denied,* 113 S. Ct. 2962 (1993) and *United States ex rel. Dick v. Long Island Lighting Co.,* 912 F.2d 13 (2d Cir. 1990) also note that no original source analysis is needed if the *qui tam* plaintiff first discloses the allegations on which his or her suit is based. See *Kreindler , supra,* 1158, and *Dick, supra,* 18.

Although completely ignored by the Opposition, such cases show a clear conflict among the Circuits regarding proper construction of the statute. For this reason alone, it is unclear why the Opposition states that there is "no conflict" among the circuits. Opposition at 7 The court opinions themselves, using *Siller* at 1348 as one example, recognize the conflict.

The second type of conflict among the Circuits centers on the meaning of the phrase "based upon". As noted in *Siller*, "based upon" is properly interpreted as meaning "derived from". Under the facts of this case, there is no showing that any allegation or transaction of the relators' complaint was derived from any published material. In fact, the allegations were discovered by the relators in 1991. More facts and specificity resulted from subsequent investigation. But, no new allegation or transaction resulted from any public disclosure. *See* App. B 1

Under the statute, the jurisdictional bar of subdivision A arises ONLY IF the relator bases a complaint on publicly disclosed "*allegations or transactions*". §3730(e)(4) *Siller* indicates that if a *qui tam* plaintiff does not "derive" its allegations or transactions from publicly disclosed sources, the action is not "based upon" such sources; therefore, the jurisdictional bar would not then apply. Other Circuits do not take *Siller's* approach

Therefore, the Opposition's statement that there is no conflict among the circuits regarding what "based upon" means is simply unsupported by the facts. Even among the Circuits that use a three-step approach, conflict exists as to the meaning of "based upon". *Siller*, for instance states that "based upon" means "derived from". *Siller* at 1349 However, although specifically rejected by *Siller*, the *Cooper* court embraced the "supported by" meaning of "based upon" used by the *Precision* court. *See* Cooper at 567 Such circuits clearly conflict

Instead of offering substantive arguments as to why the relators' cited conflicts do not exist, the Opposition embarks on a course of ascribing to the relators arguments the relators never made while disposing of its self-created "strawmen" whereby the Opposition tears down its self-created arguments while telling the court that its analysis shows the bankruptcy of the relators' position. For instance, the Opposition asserts that the relators "argue that *Siller* has been followed by other circuits in *Cooper . . . , Federal Recovery Services . . . , Dick . . . .*, and *Kreindler*" Opposition at 7 The relators never made such an argument. The Opposition perpetuates this mythical analysis by stating on six occasions that the relators argue that the above cases are the "progeny" of *Siller*. Opposition at 8-10 No such reference was ever made by the relators. Neither the word progeny nor its equivalent is found in the relator's petition anywhere.

The Opposition offers four cases that ostensibly prove that no conflict exists among the circuits, concluding that "*Siller* does not have the progeny ascribed to it by relators." Opposition at 8 Again, no such ascription was ever made.

The first case cited by the Opposition to prove that no conflict among the circuits exists is *Cooper*. However, as noted above, *Copper* and *Siller* conflict over the meaning of "based upon". Both *Siller* and *Cooper*, however, agree that a three-step construction of the statute is needed. The Opposition, in keeping with the issue it wants the court to decide, asserts that *Cooper* held that the "dispositive fact" in that case was that the *qui tam* plaintiff filed suit five weeks after a public disclosure. Opposition at 8 However, the dispositive fact in *Cooper* was actually that the plaintiff's suit "may have been at least partially based upon" publicly disclosed information. *Cooper* at 567-8 There is no allegation in the instant case that the relators' learned anything from any public disclosure. The relators knew of all of the allegations and transactions in December of 1991. *See* App. B 1 In any event, *Cooper* does not stand for the proposition that no conflict exists.

The second case cited by the Opposition to prove that no conflict among the circuits exists is *Federal Recovery Services*. The Opposition asserts that *Federal Recovery Services* held that a *qui tam* plaintiff was barred under the FCA because the action was filed more than a year after public disclosure of the allegations contained in plaintiff's complaint. Opposition at 8 However, at page 451 of the opinion, the court stated that the Plaintiff "conceded" that its action "was based on" a prior publicly disclosed and filed complaint. Therefore, the court used the "based upon" step of the three part construction of the statute to move to the original source analysis. The case does not, as alleged by the Opposition, stand for the automatic proposition that previous public disclosure triggers the bar. If anything, it appears to comport with the three-step analysis of *Siller* that is in conflict with other circuits as noted above.

The third case cited by the Opposition to prove that no conflict among the circuits exists is *Kreindler*. Although it is true that *Kreindler* cited *John Doe* with approval, it did so in the context of also citing the analysis of *Dick*, wherein the court stated that if the *qui tam* plaintiff was "a source" that

disclosed the information into the public sphere, the plaintiff would not be barred. *Kreindler* at 1158. The key issue in *Kreindler* was whether the bar applied only when the plaintiff's claim was solely or partially based on allegations or transactions previously publicly disclosed. In contrast, the relators in the instant case knew of all allegations and transactions underlying their complaint before any public disclosure occurred. *Kreindler* does not stand for the proposition that there is no conflict among the circuits as alleged by the Opposition. In fact, *Kreindler* stands for a mediating proposition along a spectrum of construction.

The fourth case cited by the Opposition to prove that no conflict among the circuits exists is *Dick*. After analyzing the facts of where the plaintiffs obtained their knowledge, the *Dick* court at 16 noted that "[i]n this case, there is no dispute that the appellants' suit is based upon publicly disclosed "allegations or transactions"". The plaintiff's original knowledge arose from news articles and a previously filed law suit. Therefore, the Opposition's assertion that this case proves there is no conflict among the circuits does not follow. If anything, the facts in *Dick* appear to show a three-step construction of the statute in conflict with cases noted above.

From the above cases, the Opposition concludes that no conflict among the Circuits exists. However, that conclusion apparently resulted from the Opposition's "strawman" arguments that do not discredit the conflicts noted in the petition for Writ Of Certiorari regarding the two-step versus three-step construction of the statute and the conflicting interpretations of the phrase "based upon" among the circuits.

C. The Relators' Action Would Not Have Been Barred In All Circuits As Asserted By The Opposition Who "Beg The Question" As To The Meaning of "Derived From" While Applying The Very Automatic Presumption The Relators Seek To Have Reviewed.

The Opposition asserts that "the general consensus among all other circuits is to preclude suits based in any part on

publicly disclosed information." Opposition at 10 However, that assertion is logically flawed in that it "begs the question" as to what "derived from" means in the context of *Siller*. Instead of giving *Siller* a fair meaning, the Opposition merely asserts its theme at page 10 that once allegations are publicly disclosed, the action is barred. The Opposition argues that "derived from" means "based upon" which means "previously publicly disclosed". *Siller* emphatically rejected such an interpretation while concluding that "based upon" means "derived from". *Siller* at 1348 Therefore, although the Opposition's interpretation eliminates some of the conflict among the circuits it does so by ignoring the clear language of opinions like *Siller* .

No evidence in the record indicates that the relators derived any allegation or transaction from any public disclosure. Therefore, under even the narrowest reading of *Siller*, for example, the relators in the case would have proceeded past the jurisdictional bar had it not been for the presumptive two-step analysis used by the Ninth Circuit in this case. This alone, rebuts the Opposition's assertion that no circuit would have allowed the relators to proceed.

Furthermore, the Opposition at page 11 argues that all circuits would bar the relators action under any "based upon" analysis - not because the allegations were previously publicly disclosed, but because the information was "derived from" a non-relator. No circuit anywhere has offered such an interpretation of subsection "A"; the statute does not even remotely suggest such an interpretation. The Opposition's statement in this regard is simply another effort to rewrite the statue and recast the arguments in this case.

The Opposition concludes that "based upon the facts of this case, relators' action would have been barred in all circuits no matter what interpretation of the phrase "based upon" as used in section 3730(e)(4) was current in that circuit." Opposition at 5-6 However, the only meaning offered by the Opposition of "derived from" is "previously publicly disclosed". Again, this appears to "beg the question" as to, for instance, the *Siller* court's analysis. Although the Opposition argues that the

perpetrator and relators together disclosed the allegations to the media, all allegations and transactions were previously known by the relators. *See* App. B 1 Thus, the relators did not derive their allegations or transactions from any public disclosure.

The Opposition also notes that the only way the Opposition can harmonize its view of the relator's reading of the statute is to insert the word "solely" before "based upon" in the statute. Opposition at 11 This is another "strawman" because the relators never made such an argument - an argument that does not even make sense on the facts of this case where the relators did not derive anything from any publicly disclosed information.

D. The Opposition Misstates The Record In Arguing That The Relators Did Not Raise The "Based Upon" Issue At The Ninth Circuit.

The Opposition asserts that the relators did not raise the "based upon" issue in the Ninth Circuit and, thus, waived their right to do so. This is not so.

Although the relators were acting in propria persona, they supplied supplemental authorities in advance of the oral argument, citing *Siller* as an important case. *See* App. A 1 *Siller* was decided after the original briefs were filed and upon its publication, the relators disclosed *Siller* to the court and opposing counsel. Furthermore , the relators devoted over 10 percent of their oral argument to the discussion of Siller and the "based upon" question. The court and opposing counsel were well aware of the arguments and authorities in this regard. Thus, the argument was not waived but was, in fact, raised at the Ninth orally and in writing.

II.

THE RELATORS' PETITION SHOULD BE GRANTED BECAUSE IT PRESENTS IMPORTANT ISSUES FOR REVIEW AND BECAUSE THE OPPOSITION'S CONCLUSION AS TO WHO POSSESSES "DIRECT" KNOWLEDGE OF FRAUD IN THIS CASE EXPOSES THE OPPOSITION'S

TRULY SKEWED VIEW OF CONGRESSIONAL INTENT BY POSITING THE PERPETRATOR OF THE FRAUD, COTEY, AS THE VERY "PARADIGM" OF WHO CONGRESS INTENDED TO BE A *QUI TAM* PLAINTIFF.

The Opposition argues that the relators in this case do not have independent knowledge of the fraud so as to qualify as an original source. Opposition at 16 & 18 However, the Ninth Circuit specifically noted that the relators possessed independent knowledge.

The Opposition also suggest by repeated use of the word"reward" that the relators are motivated by a "reward" in this case. The fact is that if the relators' information and the Mariposa Gazette article are correct, no funds have been returned to the federal treasury and a reward for ensuring such restitution is exactly what Congress intended. Tom Archer is quoted as saying that no funds were fraudulently obtained. Mr. Cotey states that he committed the practices alleged and that Mr. Archer instructed him to do so. The relators possess documents substantiating the allegations and transactions of fraud. As noted in the petition, in this unique arena of Social Welfare Services the *qui tam* plaintiffs in this case must be allowed to proceed to ensure the return of funds to the national treasury.

Against this argument, the Opposition asserts that Congress never intended the relators in this case to proceed because confidentiality statutes do not stop people from reporting fraud. However, the fact that Cotey's conscience impelled him to confess his wrongdoing does not mean that encouraging private action was not intended by Congress. It may well be illegal for some of the disclosures to have occurred in this case. However, it seems a long stretch to conclude that Congress expects others to implicate themselves, violate administrative rules, and criminal statutes to expose their own fraud in the Social welfare system. This is where *qui tam* plaintiffs such as in the instant case were intended to step in to help stop the loss of limited public resources.

The Opposition posits Mr. Cotey as the paradigm insider who Congress intended to bring a *qui tam* action in this case. Opposition at 17 The Opposition makes this argument even though Mr. Cotey was himself perpetrating the fraud. Therefore, the Opposition's argument is that Congress intended a government employee who deliberately bilks money from the national treasury for the benefit of his local agency is the paradigm person Congress intended to collect a reward for reporting his own fraudulent activities. Surely this is not what Congress intended to even remotely result from the statute let alone be the very paradigm of how the statute should operate. In fact, this interpretation would open the gates to knowledgeable but unscrupulous employees seeking a way to legally tap the national treasury.

In the instant case, such a rule would likely result in no government accountability for fraud. Mr. Cotey could potentially face charges for violating various statutes for reporting information from the confidential Welfare environment. Consequently, in that unique arena, such fraud would likely continue but for allowing some private *qui tam* involvement as outlined in the petition in this case.

CONCLUSION

For the foregoing reasons, the relators respectfully request this court to grant the petition for a Writ of Certiorari to the Ninth Circuit.

Respectfully submitted this 5th Day of October, 1996,

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APPENDIX A

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Plaintiffs in Pro Per

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. WILLIAM DEVLIN, ROD KODMAN AND STANLEY H. SIDICANE, Plaintiffs-Appellants,	)	Case No. 93-16729
	)	D. C. # CIV-F-92-5086-REC
	)	(E. D. California)
vs.	)	ADDITIONAL CITATIONS OF RELEVANT DECISIONS RENDERED SINCE FILING OF LAST BRIEF
TOM ARCHER, COUNTY OF MARIPOSA, and STATE OF CALIFORNIA, Defendants-Appellees.	)	

Plaintiffs and Appellants submit the following additional citations of relevant decisions rendered since the filing of Plaintiffs/Appellants last brief for review by the United States Court of Appeals, Ninth Circuit in the above captioned matter. Said matter is scheduled for oral argument on March 15, 1995 at 9:00 a.m.:

(1) U.S. ex rel. Fine v. Chevron, U.S.A., Inc. 39 F.3d 957 (9th Cir. 1994)

(2) U.S. ex rel. Siller v. Becton Dickinson & Co. 21 F.3d 1339 (4th Cir. 1994)

(3) Wilshire Westwood Assoc. v. Atlantic Richfield, 881 F.2d 801 (9th Cir. 1989)

(4) Blum v. Stenson, 465 U.S. 886 (2nd Cir. 1989)

Dated: March 7, 1995

/s/ Rod Kodman
ROD KODMAN
Plaintiff/Appellant in Pro Per

PROOF OF SERVICE

I, the undersigned, hereby certify:

I am a citizen of the United States and a resident of the County of Fresno, State of California. I am over the age of eighteen (18). I am not a party to the within entitled action. My business address is: 1111 Fulton Mall, Suite 1000, Fresno, California 93721.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 7, 1995, at my place of business at Fresno, California, a copy of the attached document.

ADDITIONAL CITATIONS OF RELEVANT DECISIONS RENDERED SINCE THE FILING OF LAST BRIEF,

was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to :

U.S. COURT OF APPEALS, NINTH CIRCUIT
(Orig. + 3 copies)
121 Spear Street, Second Floor
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Department of Justice
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Sacramento, CA 94244

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 7, 1995, at Fresno, California.

/s/ Elaine Harrison
ELAINE HARRISON

APPENDIX B

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Relators, in pro per

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. WILLIAM DEVLIN, et al., Plaintiffs,	) CIVIL ACTION NO. CV-F-92-5086 REC
v.	) **DECLARATION OF ROD KODMAN**
TOM ARCHER, et al., Defendants.	)

Rod Kodman declares as follows:

1. I am one of the relators in the above captioned action.

2. In January of 1992, I was having problems with Child Protective Services in Merced County and as a result of my filing a petition to the Grand Jury, filing a claim for damages and testifying before the Merced County Grand Jury, articles appeared in the Merced Sun Star and Fresno Bee concerning my involvement with Child Protective Services.

3. On November 26, 1991 I received approximately thirty telephone calls from persons having similar problems with Child Protective Services in various counties. One such call on November 26, 1991 was from William Cotey who informed me that he had a CPS related problem in Madera and that he was a child protective worker in Mariposa County.

4. On December 12, 1991, the Fresno Bee published a follow up article mentioning my name. The following day,

William Cotey again contacted me and told me that he had falsified reports to increase his counties Federal funding and that he had done so on the orders of his superiors.

5. The next day, I informed William Devlin of this contact and requested Mr. Devlin to call Mr. Cotey and to meet with him to see if he had any information that would be of assistance to me in my problems with CPS. Some time within the next several days, Mr. Devlin informed me that he had met with Mr. Cotey and that Mr. Cotey had advised him that his superiors at CPS had requested their employees to falsify their case records and time sheets to increase the funds the county was receiving from the United States Government. Mr. Devlin also informed me that he had requested Mr. Cotey to put these facts in writing so that we could have verification that Cotey had made these statements.

6. On January 21, 1991 I received a letter from William Cotey outlining how he had been directed to falsify CPS records to increase Federal funding and that he had in fact do so. This letter stated that approximately a year and a half ago, Tom Archer, his superior, who was the unit supervisor of Social Services held a meeting of his employees including Cotey and told them how they could inflate the number of hours spent on their cases to increase their Federal funding. Sometime later, I was furnished with the names and social security numbers of persons whose cases he had falsified to increase the Federal funding for Mariposa County and other documentary proof of the fraud.

7. Beginning on December 18, 1991, I attempted to inform the Federal and California authorities of the fraud so that it could be investigated by the proper authorities. In each written contact, I transmitted the letter and material by Express Mail, Overnight Delivery which will insure that there is a record of the transmittal. The first such contact was made to U.S. Representative Gary Condit's Modesto Office on December 18, 1991. At that time, I spoke with the receptionist regarding the misappropriation of federal funds and conspiracy t defraud the Federal government. I requested that the receptionist have Congressman Condit's chief of staff Michael Lynch return my telephone call. My call was never returned.

8. Since I was not successful in having anyone in Congressman Condit's office return my telephone call, on

December 23, 1991 I personally went to the Congressman's Merced office and discussed the fraud with Diane Padilla, his field representative. I requested her to inform the Congressman of the information I had received from William Cotey and the way in which Mr. Cotey had defrauded the government. Ms. Padilla told me she would contact Mr. Lynch and have him call me. I never received a reply from Mr. Lynch.

9. On January 6, 1993 I telephone the Fresno office of the Federal Bureau of Investigation and discussed the information regarding the fraud with Agent Jim Hyndman and requested that he investigate by contacting William Cotey. I was told by Agent Hyndman that he would immediately contact Cotey and conduct an investigation.

10. After receiving documentation of the fraud from Mr. Cotey, on January 21, 1992 I hand delivered a copy of the Cotey documents to Margie, the receptionist in Congressman Condit's office. At this time, I got her to sign a receipt for the materials I turned over to her. A copy of the receipt is attached hereto.

11. On January 22, 1992, I hand delivered a copy of the documentation of the fraud received from Mr. Cotey to F.B.I. Agent Hyndman. He informed me that the F.B.I. was investigating the matter and would forward a report to Washington, D.C.

12. On January 22, 1992 I wrote Congressman Condit asking him to have an appropriate Federal agency initiate an audit of the fraud and for him to forward my information to the Attorney General of the United States. A copy of that letter is attached as an exhibit to this declaration.

13. On that same day (January 22, 1992) I wrote Governor Wilson regarding the fact that the fraud involved state as well as Federal funds and outlined the conspiracy to defraud the State of California. A copy of that letter is attached to this declaration.

14. On January 23, 1992, I again wrote Congressman Condit and made a formal request that he hand deliver a copy of my documentation of the fraud to Bob Wise, Chairman of the House Government Operations Subcommittee, the United States Inspector General and the U.S. General Accounting Office so that the fraud could be investigated. A copy of that letter is attached hereto.

15. On January 27, 1992, I wrote Representative Bob Wise directly including a copy of my allegations and documentary evidence. I specifically requested him to conduct a congressional investigation of the misappropriation of funds and fraud being perpetrated on the U.S. Government by the California Department of Human Services. A copy of that letter is attached hereto.

16. On February 3, 1992 I wrote Congressman John Doolittle, (Republican, California) outlining the fraud and giving him a copy of the documentation. I requested him to deliver copies of the documents to Congressman Wise and Dingle, the U.S. Inspector General, the General Accounting Office and the U.S. Department of Health and Human Services. A copy of that letter is attached hereto.

17. On February 3, 1992 I wrote Congressman John Dingle, Chairman of the House Subcommittee on Oversight and Investigation concerning the fraud. I had been informed that Congressman Dingle's committee had investigated the alleged false claims at Stanford University. I outlined the fraud and sent him a copy of the documentation. I requested him to undertake a congressional investigation and to deliver the information to the General Accounting Office and the Department of Health and Human Services. A copy of that letter is attached hereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

This 25th day of June, 1993

/s/ Rod Kodman
Rod Kodman